Supreme Court, U.S.
FILED

001429 MAR 13 2001

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

JOSEPH E. KATZ and ROGER P. MOORE,
on behalf of themselves and 128 others similarly situated,
Petitioners,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GARY L. OLIMPIA
Counsel of Record
OLIMPIA, WHELAN & LIVELY
2502 STEVENS CREEK BLVD.
SAN JOSE, CA 95128-9973
(408) 971-7252

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

113 pp

QUESTION PRESENTED

Did the United States Supreme Court's holding in ***Kimel v. Florida Board of Regents***, 528 U.S. 62, 120 S. Ct. 631 (2000), that the 1974 Congressional Amendments to the ADEA, which extended that Act to the States, and which formed the only basis of subject matter jurisdiction over private ADEA claims against states, violated the Eleventh Amendment destroy federal court subject matter jurisdiction over such claims?

PARTIES TO THE PROCEEDING

Petitioners

Joseph E. Katz and Roger P. Moore, on behalf of themselves and 128 others similarly situated. All Petitioners are individuals and have no corporate affiliations.

Respondent

The Regents of the University of California.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

BASIS FOR JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 4

ARGUMENT FOR GRANTING WRIT 7

ARGUMENT 1

The Ninth Circuit Court of Appeals Decision in This Case Is Precluded by This Court's Holding in *Kimel* 9

ARGUMENT 2

The Ninth Circuit Court of Appeals Decision in this Case Is Inconsistent with Other Circuit Courts of Appeals Concerning the Effect of the Eleventh Amendment on Subject Matter Jurisdiction 19

ARGUMENT 3

This Court Should Now Settle the Question of the Effect of Eleventh Amendment Immunity on Subject Matter Jurisdiction 25

CONCLUSION 27

APPENDIX

Appendix A
Court of Appeals Opinion, 10/25/00 . . . . . 1a

Appendix B
District Court Judgment on Jury Verdict, 2/5/99 . . . . . 13a

Appendix C
Court of Appeals Order Denying Petition for Rehearing and Rehearing *En Banc*, 12/13/00 . . . . . 17a

Appendix D
Appellants' Motion to Dismiss Appeal, 1/28/00 . . . . . 19a

Appendix E
Appellee's Opposition to Appellant's Motion to Dismiss Appeal, 3/10/00 . . . . . 36a

Appendix F
Appellants' Reply In Support of Motion to Dismiss Appeal, 3/28/00 . . . . . 55a

Appendix G
29 U.S.C. §§ 203, 216, 623, 626, 630 . . . . . 69a

TABLE OF AUTHORITIES

Cases

Alden v. Maine,
527 U.S. 706, 119 S. Ct. 2240 (1999) 25

Atascadero State Hospital v. Scanlon,
473 U.S. 234, 105 S. Ct. 3142 (1985) 20-21

Bender v. Willamsport,
475 U.S. 534, 106 S. Ct. 1326 (1986) 18

Blatchford v. Native Village of Noatak,
501 U.S. 775, 111 St. Ct. 2578 (1991) 20, 21

Board of Trustees of the University of Alabama v. Garrett,
2001 U.S. LEXIS 1700,
___ U.S. ___, ___ S. Ct. ___
(February 21, 2001) 7, 17

Butler v. New York State Department of Law,
211 F.3d 739 (2d Cir. 2000). 21

Calderon v. Ashmus,
523 U.S. 740, 118 S. Ct. 1694 (1998) 26

Chisholm v. Georgia,
2 U.S. (2 Dall.) 419, 1 L. Ed. 440 (1793). 21

City of Boerne v. Flores,
521 U.S. 507, 117 S. Ct. 2157 (1997) 7

Clark v. Barnard,
108 U.S. 436, 2 S. Ct. 878 (1883) 25

Coger v. Board of Regents of The State of Tennessee,
209 F.3d 485 (6th Cir. 2000) 23

College Savings Bank v.
Florida Prepaid Postsecondary Ed. Expense Board,
527 U.S. 666, 119 S. Ct. 2199 (1999) . . 7, 17, 25

Edelman v. Jordan,
415 U.S. 651, 94 S. Ct. 1347 (1974), . . 25-26, 27

EEOC v. Wyoming,
460 U.S. 226, 103 S. Ct. 1054 (1983). 9, 14

Erickson v. Board of Governors of State Colleges
and Universities,
207 F.3d 945, 952 (7th Cir. 2000) 23

Florida Prepaid Postsecondary Ed. Expense Board v.
College Savings Bank,
527 U.S. 627, 199 S. Ct. 2199 (1999) 7, 25

Fromm v. Veteran's Affairs,
220 F.3d 887 (8th Cir. 2000) 24

Ford Motor Co. v. Department of Treasury,
323 U.S. 459, 65 S. Ct. 347 (1945) 25

Hans v. Louisiana,
134 U.S. 1, 10 S. Ct. 504 (1890) 20

Harper v. Virginia Dept. of Taxation,
509 U.S. 86, 113 S. Ct. 2510 (1993) 22

Hill v. Blind Industries and Services of Maryland,
179 F.3d 754 (9th Cir. 1999) 17, 27

Idaho v. Coeur d' Alene Tribe of Idaho,
521 U.S. 261, 117 S. Ct. 2028 (1997) 26

Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinea,
456 U.S. 694, 102 S. Ct. 2099 (1982) 26

Kazmier v. Widmann,
225 F.3d 519 (5th Cir. 2000) 23

Kimel v. Florida Board of Regents,
528 U.S. 62, 120 S. Ct. 631 (2000) . . . . . *passim*

Mixon v. State of Ohio,
93 F.3d. 389 (6th Cir. 1999) 22

Parden v. Terminal R. Co. of Ala. Docks Dept.,
377 U.S. 184, 84 S. Ct. 1207 (1964) 17

Patsey v. Board of Regents of Florida,
457 U.S. 496, 102 S. Ct. 2557 (1982) 26

Pennhurst State Sch. and Hosp. v. Halderman,
465 U.S. 89, 104 S. Ct. 900 (1984) 21

Pennsylvania v. Union Gas Co.,
491 U.S. 1, 109 S. Ct. 2213 (1989) 25

Puerto Rico Aqueduct and Sewer Authority v. Metcalf and Eddy, Inc.,
506 U.S. 139, 113 S. Ct. 684 (1993) 20

Reese v. Michigan,
cert. denied, 2001 U.S. LEXIS 2030
(U.S. March 5, 2001) 22

Seminole Tribe of Florida v. Florida,
517 U.S. 44, 116 S. Ct. 1114
(1996) . . . . . *passim*

Sims v. University of Cincinnati,
219 F.3d 559 (6th Cir. 2000) 23

Stanley v. Wisconsin Department of Corrections,
213 F.3d 340 (7th Cir. 2000) 24

Stevens v. Illinois Department of Transportation,
210 F.3d 732, at 24 (7th Cir. 2000) 23

Walker v. Illinois Department of Corrections,
213 F.3d 344 (7th Cir. 2000) 24

Wisconsin Department of Corrections v. Schacht,
524 U.S. 381, 118 S. Ct. 2047 (1998) 18, 26

Statutes and Other Authorities

U.S. Const., amend. XI . . . . . *passim*

U.S. Const., amend. XIV . . . . . *passim*

U.S. Const. Article III, section 2 1-2

28 U.S.C. § 1331 . . . . . 2, 4, 8, 17

28 U.S.C. § 1367(a) 2, 4, 8

28 U.S.C. § 1367(b) 2

28 U.S.C. § 1367(c) 2

29 U.S.C. § 203(c) 3

29 U.S.C. § 203(d) 3

29 U.S.C. § 203(x) 3

29 U.S.C. § 216(b) 3

29 U.S.C. § 623(a) 3

29 U.S.C. § 626(b) 3

29 U.S.C. § 626(c) 3

29 U.S.C. § 630(b) 3, 9, 14

29 U.S.C. § 630(f) 3

29 U.S.C. § 630(i) 3

California Fair Employment and Housing Act,
California Government Code §§ 12940 *et seq.* . . . 4

Cal. Govt. Code Ann. § 12900 *et seq.*
(West 1992 and Supp. 1999) 11

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 229 F.3d 831 (9th Cir. 2000). A copy of the Opinion is included in the Appendix at Appendix A at 1a-12a. The Judgment of the District Court for the Northern District of California was entered on February 5, 1999, was unreported, and is included in Appendix B at 13a-16a.

BASIS FOR JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its Opinion on October 25, 2000. On November 11, 2000, Petitioners filed a Petition for Rehearing *En Banc* which the United States Court of Appeals denied on December 13, 2000 (App. C at 17a-18a).[1] The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made,

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[1] Citations to "App." are to the appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i).

under their Authority;-to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;-to Controversies to which the United States shall be a Party;-to Controversies between two or more States;-between a State and Citizens of another State;-between citizens of different States;-between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. . . .

* * * * *

United States Constitution, Amendment XI:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

* * * * *

28 U.S.C. § 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

* * * * *

28 U.S.C. § 1367(a):

Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all

other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. . . .

29 U.S.C. § 203(c), (d), and (x)

(See App. G at 69a for full text).

* * * * *

29 U.S.C. § 216 (b):

(See App. G at 70a-71a for full text).

* * * * *

29 U.S.C. § 623(a):

(See App. G at 71a for full text).

* * * * *

29 U.S.C. § 626(b) and (c):

(See App. G at 71a-73a for full text).

* * * * *

29 U.S.C. § 630(b),(f), and (i):

(See App. G at 73a-74a for full text).

* * * * *

STATEMENT OF THE CASE

This is an age discrimination class action brought on behalf of 130 now mostly retired employees of the Lawrence Berkeley and Lawrence Livermore National Laboratories, all of whom were first employed by the National Laboratories prior to 1961, and all of whom worked at the National Laboratories continuously thereafter for at least 32 years. The action was brought under the ADEA and California state statutes governing anti-discrimination in employment (California Fair Employment and Housing Act located at California Government Code §§ 12940 *et seq.*). In 1993, the Petitioners were **all** excluded from a nearly $275 million early retirement incentive program at the National Laboratories by the Respondent University of California, **solely** by reason of their age, as that fact dictated that the Petitioners had already been working at the National Laboratories prior to 1961 when the University adopted a new retirement plan for all new employees that excluded the Petitioners.

In 1996, the Petitioners brought this age discrimination class action in the federal district court against the Regents of the University of California pursuant to the 1974 Amendments to the ADEA, which had extended application of that Act to state government and state agency employers. See App. G at 69a-74a. Prior to those Amendments, the ADEA did not apply to the states as employers. The basis of federal court jurisdiction in the first instance over the Petitioners' ADEA claims was therefore 28 U.S.C. § 1331, a civil action arising under the laws of the United States. The basis of federal court jurisdiction over the state law claims was 28 U.S.C. § 1367(a).

After two-and-a-half years of pre-trial litigation, the district court dismissed the Petitioners' disparate impact, "de

facto" age discrimination claims as a matter of law *sua sponte* on the day before opening statements to the jury. The jury then rejected Petitioners' intentional discrimination claims after a trial. Judgment was then entered in the district court. (App. B at 13a-16a).

The Petitioners appealed to the Ninth Circuit Court of Appeals from the judgment of the district court and, while the appeal was pending, the Supreme Court rendered its landmark decision in ***Kimel v. Florida Board of Regents***, 528 U.S. 62; 120 S. Ct. 631 (2000). The Supreme Court noted in the Opinion that **"[t]his is not the first time we have considered the constitutional validity of the 1974 extension of the ADEA to state and local governments."** (528 U.S. at 78, emphasis added) and proceeded to hold that the 1974 Amendments to the ADEA subjecting state government employers to liability for age discrimination claims brought by individuals under the ADEA was unconstitutional under the sovereign immunity provisions of Eleventh Amendment, and that Congress' attempt to abrogate the states' sovereign immunity by enacting those Amendments was an inappropriate exercise of Congress' lawmaking authority under § 5 of the Fourteenth Amendment.

Following the Supreme Court's decision in ***Kimel, supra***, the Petitioners filed a motion to vacate the judgment of the district court and to dismiss the appeal for lack of federal subject matter jurisdiction, without prejudice to the Petitioners' ability to refile in state court under the California state age discrimination statutes, which was precisely the disposition rendered by the Supreme Court in ***Kimel*** (App. D at 19a-35a and App. F at 55a-68a). Respondent opposed that motion and for the first time, filed a Declaration of the General Counsel for the Regents of the University which purported to "waive" Respondent's Eleventh Amendment

immunity "for purposes of this litigation only" (App. E at 36a-54a, see specifically 45a).

On October 25, 2000, the Ninth Circuit Court of Appeals issued its published Opinion in which it held that the Supreme Court's decision in ***Kimel,*** that declared the 1974 Amendments to the ADEA to be unconstitutional, did not destroy subject matter jurisdiction in this case, but instead simply created a waiveable affirmative defense under the sovereign immunity provisions of the Eleventh Amendment. (App. A at 5a-6a). The Court of Appeals ruled that the Respondent had a right, even on appeal, to either assert or waive that defense "on a case-by-case basis". (App. A at 5a). This means that in the Ninth Circuit, and contrary to other Circuits which have considered sovereign immunity to sufficiently partake of the "jurisdictional bar" so as to limit subject matter jurisdiction (See Argument 2, *infra*), a state is free to litigate ADEA claims against it in federal court and **then** assert its sovereign immunity in the event of an unfavorable result.

The Court of Appeals further ruled in this case that, by filing an express waiver in that Court, the Respondent had effectively waived its sovereign immunity so that even **after** ***Kimel*** was decided, the Court had subject matter jurisdiction under the unconstitutional 1974 Amendments to the ADEA to proceed to consider the appeal on the merits. (App. A at 6a). The Court of Appeals then summarily affirmed the district court's *sua sponte* dismissal as a matter of law of the Petitioners' "de facto" age discrimination claims, and affirmed the jury's verdict in Respondent's favor on the Petitioners' intentional age discrimination claims. (App. A at 6a-12a). Petitioners' request for rehearing and *en banc* review was denied by the Court of Appeals on December 13, 2000. (App. C at 17a-18a).

ARGUMENT FOR GRANTING WRIT

This case presents an issue of critical importance to federal court jurisprudence. In a string of relatively recent decisions, the United States Supreme Court has held that Congress exceeded its constitutional authority in several areas by enacting laws which violated the Eleventh Amendment. Only last month, the Court held in ***Board of Trustees of the University of Alabama v. Garrett***, 2001 U.S. LEXIS 1700, ___ U.S. ___, ___ S. Ct. ___ (February 21, 2001) that suits brought in federal court by state employees to recover money damages by reason of a state's failure to comply with Title I of the Americans with Disabilities Act are barred by the Eleventh Amendment, Congress having acted outside of its constitutional authority by subjecting states to such suits. This follows on the heels of ***Kimel v. Florida Board of Regents***, 528 U.S. 62, 120 S. Ct. 631 (2000), (Congress' extension of the ADEA to states was an invalid abrogation of states' Eleventh Amendment immunity); ***Florida Prepaid Postsecondary Ed. Expense Board v. College Savings Bank***, 527 U.S. 627, 199 S. Ct. 2199 (1999) (Patent Remedy Act found unconstitutional under the Eleventh Amendment); ***College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Board***, 527 U.S. 666, 119 S. Ct. 2199 (1999) (Trademark Remedy Clarification Act which extended Lanham Act to the states found unconstitutional and federal courts without jurisdiction to entertain suit against state of Florida); ***City of Boerne v. Flores***, 521 U.S. 507, 117 S. Ct. 2157 (1997) (striking down the Religious Freedom Restoration Act because Congress exceeded its power in its enactment); and ***Seminole Tribe of Florida v. Florida***, 517 U.S. 44, 116 S. Ct. 1114 (1996) (Eleventh Amendment prohibited Congress from making the state of Florida capable of being sued in federal court under the Indian Gaming

Regulatory Act where Congress had attempted to invalidly abrogate immunity under the Indian Commerce Clause).

The collective effect of these cases, particularly on suits now pending in federal courts, which involve the laws affected by these cases, is to raise the question of the nature of Eleventh Amendment immunity *vis a vis* federal court subject matter jurisdiction. This question is especially critical in cases such as that presented here where the specific Congressional action which was determined to have been unconstitutional by ***Kimel, supra***, (1974 extension of ADEA to states), **was the only source of federal court subject matter jurisdiction in the first instance through federal question and supplemental jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367(a)**. In the wake of the above mentioned Supreme Court cases, the Ninth Circuit Court of Appeals has entered a decision in this case which is in conflict with decisions of other Circuit Courts of Appeals relative to the presence or absence of federal court subject matter jurisdiction following the invalidation by the Supreme Court of the particular federal law at issue in the particular case. Moreover, given recent Supreme Court activity concerning the Eleventh Amendment, the Court not yet having decided whether the Eleventh Amendment reaches subject matter jurisdiction, and the inconsistent Court of Appeals decisions concerning this question, the United States Supreme Court should now settle this most important question of federal law.

ARGUMENT 1

The Ninth Circuit Court of Appeals Decision in This Case Is Precluded by This Court's Holding in *Kimel*

In ***Kimel v. Florida Board of Regents,*** 528 U.S. 62, 120 S. Ct. 631 (2000), the Supreme Court declared the specific jurisdictional provision of the ADEA upon which this case is based to be unconstitutional and thereby eliminated original federal subject matter jurisdiction in this case. The Federal Age Discrimination in Employment Act (ADEA) was enacted by Congress in 1967. When first passed, the ADEA applied only to private employers. However, in 1974, in a statute consisting primarily of amendments to the Fair Labor Standards Act (FLSA), Congress extended application of the ADEA's substantive requirements to the States. (See App. G at 69a-74a). As noted in ***Kimel***, Congress accomplished that expansion in scope by simple amendments such as to the definition of "employer" contained in ***29 U.S.C. § 630(b)*****: "The term [employer] also means...a state or political subdivision of a state and any agency or instrumentality of a state or political subdivision of a state..."**

In 1983, the U.S. Supreme Court upheld the constitutional validity of the 1974 extension of the ADEA to state and local governments in ***EEOC v. Wyoming***, 460 U.S. 226, 243, 103 S. Ct. 1054 (1983). That validity was grounded, however, on the then concrete footing of Congress' ability to abrogate the states' immunity under its legislative powers derived from Article I of the Constitution. That footing was later stripped away by the Supreme Court's holding in ***Seminole Tribe of Florida v. Florida***, 517 U.S. 44, 116 S. Ct. 1114 (1996), that Congress could not abrogate Eleventh Amendment immunity simply by enacting legislation

under its general grant of Article I legislative powers. Thus, following ***Seminole Tribe, supra***, the constitutional validity of the 1974 extension of the ADEA to the states could only be derived, if at all, from Congress' enforcement powers under the Fourteenth Amendment.

In 1998, the Eleventh Circuit Court of Appeals held in ***Kimel, et al. v. Florida Board of Regents***, 139 F.3d. 1426 (11th Cir. 1998) that the Fourteenth Amendment did not authorize Congress' attempt to abrogate the States' Eleventh Amendment sovereign immunity by enacting the 1974 Amendments to the ADEA. The U.S. Supreme Court then granted *certiorari* to resolve the conflict among the Federal Circuit Courts of Appeals on the question of whether the ADEA validly abrogates the States' Eleventh Amendment sovereign immunity.

On January 11, 2000, the Supreme Court decided ***Kimel v. Florida Board of Regents, supra***. In a five to four decision written by Justice O'Connor, the Court held that although **"§ 5 of the Fourteenth Amendment does grant Congress the authority to abrogate the States' sovereign immunity, [528 U.S. at 80] . . . the ADEA is not 'appropriate legislation' under § 5 of the Fourteenth Amendment"** (528 U.S. at 83) and therefore **". . . the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment. The ADEA's purported abrogation of the States' sovereign immunity is accordingly invalid."** (528 U.S. at 91). The Court concluded that: **"Because the ADEA does not validly abrogate the States' sovereign immunity, however, the present suits must be dismissed."** (528 U.S. at 92).

The ***Kimel*** case was a consolidation of three separate age discrimination cases against agencies of the Florida and

Alabama state governments. The Plaintiffs had filed suit in federal court under both the ADEA and the parallel age discrimination provisions of the Florida Civil Rights Act. The other two consolidated cases were age discrimination cases filed by faculty members against an Alabama state university and by state prison employees against the Florida Department of Corrections.

Significantly, the Supreme Court in ***Kimel*** held that, notwithstanding the dismissal of their federal ADEA claims on constitutional jurisdictional grounds, the state employees could still pursue their age discrimination claims under the state age discrimination statutes that exist in almost every state in the union, including California:

> **Our decision today does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers. We hold only that, in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits by private individuals. State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union. (fn1) Those avenues of relief remain available today, just as they were before this decision.**
>
> **(fn1) . . . Cal. Govt. Code Ann. § 12900 *et seq.* (West 1992 and Supp. 1999) . . .** (Emphasis added). (528 U.S. at 91-92).

Therefore, the Supreme Court in ***Kimel*** made it explicitly clear that its decision invalidating the provisions of

the ADEA that allowed age discrimination suits by private citizens against states and agencies thereof does not in any way affect relief available under state age discrimination statutes such as FEHA.

Having found the 1974 Amendments to the ADEA to be invalid, the Supreme Court's decision in ***Kimel, supra***, eliminated any basis for original subject matter jurisdiction of this action in federal courts under the ADEA on constitutional grounds, and also eliminated any supplemental jurisdiction of the district court may have had over the Petitioners' state law age discrimination claims under FEHA. Therefore, all federal court proceedings heretofore conducted in this case have been nullified by ***Kimel*** as having been conducted without any original or supplemental subject matter jurisdiction. Rather than recognizing this fact by vacating the judgment and dismissing the case, **the Ninth Circuit characterized the Supreme Court's decision in *Kimel* as simply holding . . . "that the States have Eleventh Amendment immunity from suits under the ADEA."** (App. A at 2a). The Opinion goes on to state:

> **The case is unusual, for it is the state that asserts that it has waived its immunity and the plaintiffs who assert that the state has not. We agree with the state that it has waived its immunity by consenting to the prosecution of this case through trial and by expressly waiving any Eleventh Amendment defense in this case".** (App. A at 2a-3a). (Emphasis added).

However, the Petitioners did not assert below that the state (University) had not waived its sovereign immunity affirmative defense. Instead, they argued that, after the

Supreme Court in ***Kimel*** had declared the only statute that provided a basis for federal subject matter jurisdiction to be unconstitutional under the Eleventh and Fourteenth Amendments, the federal courts simply did not have subject matter jurisdiction to adjudicate the Petitioners' ADEA claims against a state government employer on the merits.

The Ninth Circuit explained its ruling in this regard as follows:

> **Plaintiffs assert that the Supreme Court's decision *Kimel* eliminated the basis for federal subject matter jurisdiction over this suit by striking down the provision in the ADEA conferring jurisdiction over age discrimination suits against state agencies. We disagree. Nothing in *Kimel* suggests that the Court intended to remove the statutory jurisdictional basis for age discrimination suits against a state or its agencies. It held that on account of Eleventh Amendment immunity the states can not be compelled to submit to the jurisdiction of the federal courts in such suits.**
>
> **California may therefore waive its Eleventh Amendment immunity on a case-by-case basis, as we hold it has here, and subject itself to suit under the ADEA.** (App. A at 5a). (Emphasis added).

However, the specific language of the Supreme Court's Opinion in ***Kimel*** leaves no room for the Ninth Circuit's interpretation. The Supreme Court explained its ruling in ***Kimel*** in relevant parts as follows:

Since its enactment, the ADEA's scope of coverage has been expanded by amendment. Of particular importance to these cases is the Act's treatment of state employers and employees. When first passed in 1967, the ADEA applied only to private employers. . . . In 1974 . . . Congress extended application of the ADEA's substantive requirements to the States. . . . Congress accomplished that expansion in scope by a simple amendment to the definition of "employer" contained in *29 U.S.C. § 630(b)*: "The term [employer] also means . . . a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State." (528 U.S. at 68).

* * * * *

We granted certiorari to resolve a conflict among the Federal Courts of Appeals on the question whether the ADEA validly abrogates the States' Eleventh Amendment immunity. (528 U.S. at 72).

* * * * *

This is not the first time we have considered the constitutional validity of the 1974 extension of the ADEA to state and local governments. In *EEOC v. Wyoming*, 460 U.S. 226, 243, 75 L. Ed. 2d 18, 103 S. Ct. 1054 (1983), we held that the ADEA

constitutes a valid exercise of Congress' power "to regulate Commerce . . . among the several States,". . . . Because we found the ADEA valid under Congress' Commerce Clause power, we concluded that it was unnecessary to determine whether the Act also could be supported by Congress' power under § 5 of the Fourteenth Amendment. Resolution of today's cases requires us to decide that question. . . . In *Seminole Tribe*, we held that Congress lacks power under Article I to abrogate the States' sovereign immunity. 517 U.S. at 72-73. (Emphasis added). (528 U.S. at 78).

* * * * *

Under our firmly established precedent then, if the ADEA rests solely on Congress' Article I commerce power, the private petitioners in today's cases cannot maintain their suits against their state employers. . . . (528 U.S. at 79).

* * * * *

Accordingly, the private petitioners in these cases may maintain their ADEA suits against the States of Alabama and Florida if, and only if, the ADEA is appropriate legislation under § 5 . . . (528 U.S. at 80). (Emphasis added).

* * * * *

> . . . **we hold that the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment. The ADEA's purported abrogation of the States' sovereign immunity is accordingly invalid.**
>
> **Our decision today does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers. We hold only that, in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits by private individuals. State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every state of the Union. Those avenues of relief remain available today, just as they were before this decision. ... Because the ADEA does not validly abrogate the States' sovereign immunity, however, the present suits must be dismissed. Accordingly, the judgment of the Court of Appeals is affirmed.** (528 U.S. 91-92). (Emphasis added).

The above quoted language from ***Kimel*** makes it abundantly clear that the Supreme Court was simply declaring the 1974 Amendments to the ADEA, which extended federal jurisdiction in ADEA age discrimination claims by private citizens to include claims against state government employers and which was the only basis for federal subject matter jurisdiction over such claims, to be unconstitutional under the Eleventh and Fourteenth Amendments. The Court's holding was not made dependent upon whether a state asserted its

immunity, nor could it have been because as determined by the holding, Congress acted invalidly and unconstitutionally by enacting the 1974 Amendments at all. If Congress was without power to enact the Amendments, whether pursuant to Article I of the Constitution or the Fourteenth Amendment, then the ADEA Amendments themselves cannot remain after ***Kimel*** as a source of federal subject matter jurisdiction through 28 U.S.C. § 1331. See also, in accord, ***Board of Trustees of University of Alabama v. Garrett***, 2001 U.S. LEXIS 1700 (February 21, 2001), slip op. p.6. (**"Accordingly, the ADA can apply to the states only to the extent that the statute is appropriate § 5 legislation"** and holding that it is not.)

In reaching its conclusion that ***Kimel*** did not eliminate the basis for federal subject matter jurisdiction in this case, the Ninth Circuit relied on its own holding in ***Hill v. Blind Industries and Services of Maryland***, 179 F.3d 754 (9th Cir. 1999). In ***Hill, supra***, the Ninth Circuit refused to allow state agency defendants to retain the option of asserting their sovereign immunity after they had had an opportunity to see "which way the wind was blowing" in the litigation. The Ninth Circuit there held that an implied or constructive waiver of sovereign immunity could and did occur by the defendants having appeared and participated in federal court litigation.

The ***Hill*** decision itself is entirely suspect by reason of the United States Supreme Court's holding in ***College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Board,*** 527 U.S. 666, 119 S. Ct. 2199 (1999), which expressly overturned ***Parden v. Terminal R. Co. of Ala. Docks Dept.***, 377 U.S. 184, 84 S. Ct. 1207 (1964) (which had upheld a constructive waiver of sovereign immunity) and conclusively established that Eleventh Amendment immunity **cannot** be impliedly or constructively waived. Thus, although it is true

that Eleventh Amendment sovereign immunity can sometimes be waived by a state statutory enactment consenting to suit in federal court, or by an affirmative waiver filed with the court, **such a waiver can logically only occur in cases where the federal court has subject matter jurisdiction irrespective of whether or not the defendant has asserted its sovereign immunity**.

Here, it just so happens that Eleventh Amendment sovereign immunity was the basis of the Supreme Court's decision in ***Kimel*** to completely invalidate, on constitutional grounds, the only statutory foundation which had previously been thought to exist for federal jurisdiction in this case. Since subject matter jurisdiction can never be conferred on a federal court by the consent of one or more of the parties, *Bender v. Willamsport*, 475 U.S. 534, 541, 106 S. Ct. 1326, 1331 (1986), the Respondent's waiver of immunity in response to Petitioners' motion to dismiss the appeal could not have had the effect of conferring continuing subject matter jurisdiction on the federal courts in this case in the wake of ***Kimel***.

Any other result would have the intolerable effect of allowing state agency defendants nationwide to decide in pending cases, on a case by case basis, whether to resurrect jurisdiction by waiving their sovereign immunity defense where they are pleased with the progress of the litigation and to file motions to dismiss for lack of subject matter jurisdiction in those cases where they suffer an unfavorable result. Justice Kennedy raised just this point in his concurring Opinion in ***Wisconsin Department of Corrections v. Schacht***, 524 U.S. 381, 118 S. Ct. 2047 (1998).

In ***Kimel***, the Supreme Court decided on constitutional grounds that all age discrimination cases against state agencies

must be relegated to state courts based on state law. To implement this decision, all pending ADEA age discrimination cases that have been brought solely against a state agency defendant in federal court, **where federal jurisdiction is based exclusively on the ADEA**, must simply be dismissed without prejudice to refiling under state law in state court. For those cases that also involve non-state agency defendants and/or other employment discrimination claims (such as those based on race or gender), the remedy is simply to dismiss the ADEA claims against the state agencies and allow the other claims to continue in federal court. In the wake of ***Kimel***, federal courts simply no longer have subject matter jurisdiction over private ADEA claims against state agencies, and no waiver of sovereign immunity by the state agency defendant can or should change that. Therefore, the Ninth Circuit's decision to the contrary in this case is in conflict with ***Kimel***.

ARGUMENT 2

The Ninth Circuit Court of Appeals Decision in This Case is Inconsistent with Other Circuit Courts of Appeals Concerning the Effect of the Eleventh Amendment on Subject Matter Jurisdiction

The Ninth Circuit's decision in this case rests upon the premise that sovereign immunity does not ever reach subject matter jurisdiction and is akin to *in personam* jurisdiction in that it can be asserted or waived as an affirmative defense at the sole option and as a privilege of the state alone. This is inconsistent with the manner in which other Circuit Courts of Appeals have applied the Eleventh Amendment, especially in the absence of a state asserting such immunity.

The very language of the Eleventh Amendment is jurisdictional in nature:

> **The juridical power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.** (U.S. Const. amend. XI.)

The Supreme Court, however, has long "**understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition which it confirms.**" ***Seminole Tribe of Florida v. Florida***, 517 U.S. 44, 54, 116 S. Ct. 114 (1996) (quoting ***Blatchford v. Native Village of Noatak***, 501 U.S. 775, 779, 111 St. Ct. 2578 (1991). That presupposition is that each state is a sovereign which is not subject to suit, even by its **own** citizens. ***Seminole Tribe***, ***supra***, 517 U.S. at 54 quoting ***Hans v. Louisiana***, 134 U.S. 1, 10 S. Ct. 504 (1890).

While often noted for preserving state sovereignty, the Amendment only accomplishes this end through its jurisdictional limitation. ***Puerto Rico Aqueduct and Sewer Authority v. Metcalf and Eddy, Inc.***, 506 U.S. 139, 144, 113 S. Ct. 684 (1993) ("**[The Eleventh Amendment's] withdrawal of jurisdiction effectively confers an immunity from suit.**") Its negative instruction on how to construe federal judicial power operates as an additional boundary on that power, supplementing the restraints on judicial power already implicitly provided in Article III of the Constitution. See ***Seminole Tribe***, ***supra***, **517 U.S. at 64, 72-73** (Eleventh Amendment restricts judicial power under Article III); ***Atascadero State Hospital v. Scanlon***, 473 U.S. 234, 238,

105 S. Ct. 3142 (1985), quoting ***Pennhurst State Sch. and Hosp. v. Halderman***, 465 U.S. 89, 98, 104 S. Ct. 900 (1984) (**"The significance of [the Eleventh Amendment] 'lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III' of the Constitution."**)

The historical context surrounding the enactment of the Eleventh Amendment supports the position that the Eleventh Amendment, if not part and parcel of the Article III restrictions, is certainly intertwined with Article III jurisprudence. The Supreme Court's interpretation of Article III powers in ***Chisholm v. Georgia***, 2 U.S. (2 Dall.) 419, 1 L. Ed. 440 (1793), promoted Congress' "outraged reversal" of that decision through enactment of the Eleventh Amendment. In other words, Congress and the state legislatures enacted the Eleventh Amendment as a corrective response to a judicial interpretation of Article III that was offensive to the states. See also ***Seminole Tribe, supra,*** 517 U.S. at 72-73 (**"The Eleventh Amendment restricts the judicial power under Article III. . . ."**); ***Blatchford v. Native Village of Noatak,*** 501 U.S. 775, 779, 111 S. Ct. 2578 (1991) (Eleventh Amendment's sovereign immunity principle limits the judicial authority in Article III.) The Ninth Circuit's decision in this case, that Eleventh Amendment immunity is solely a matter to be raised as an affirmative defense just as a lack of *in personam* jurisdiction and that it is unrelated to the Court's Article III powers, ignores the long history and application of the Amendment, as well as its very language.

On May 3, 2000, the United States Court of Appeals for the Second Circuit decided ***Butler v. New York State Department of Law***, 211 F.3d 739 (2d Cir. 2000). The Second Circuit there held that following ***Kimel, supra***, the plaintiffs' ADEA claims against a state agency had to be

dismissed for lack of subject matter jurisdiction. Of particular note is that the defendant state agency in that case had not raised or expressly waived its sovereign immunity and **the Court of Appeals raised the issue *sua sponte* as a preliminary issue of subject matter jurisdiction precluding its ability to address the merits of the ADEA claims**. 211 F.3d at 745-746. The Second Circuit also concluded, relying on ***Harper v. Virginia Dept. of Taxation***, 509 U.S. 86, 95-97, 113 S. Ct. 2510 (1993), that ***Kimel*** must be applied to all cases, such as the present one, which are still open on direct review. 211 F.3d at 745-746. The Second Circuit's conclusions in this regard are the very arguments that the Petitioners in this case have urged must result in a dismissal without prejudice of their ADEA claims and is the direct opposite of the result here reached by the Ninth Circuit.

On March 5, 2001, the United States Supreme Court denied *certiorari* in a case decided by the Court of Appeals for the Sixth Circuit in which a plaintiff had sued the State of Michigan under Title II of the Americans with Disabilities Act. ***Reese v. Michigan***, *cert. denied*, 2001 U.S. LEXIS 2030 (U.S. March 5, 2001). The Court of Appeals in that case had also *sua sponte* dismissed the plaintiff's ADA claims for lack of subject matter jurisdiction. The Sixth Circuit operates based on the long standing proposition that the Courts of Appeals have both jurisdiction and discretion *sua sponte* to consider sovereign immunity as a basis for lack of subject matter jurisdiction in cases before it. ***Mixon v. State of Ohio***, 93 F.3d. 389, 397 (6th Cir. 1999). This, of course, is inconsistent with the Ninth Circuit's holding in this case (and in ***Hill***, ***supra***, upon which it relied in reaching that decision) that sovereign immunity operates only as an affirmative defense which it ought to ignore unless raised.

Additionally, once sovereign immunity has been raised, other Circuits consider federal court subject matter jurisdiction to be absent in a manner inconsistent with the simple assertion of it as an affirmative defense. See ***Kazmier v. Widmann***, 225 F.3d 519, 526-527, 529, 533 (5th Cir. 2000) [The court held the Family and Medical Leave Act unconstitutional under a ***Kimel*** analysis and held that the plaintiff therefore **"cannot enforce that [statute] against the State of Louisiana in Federal Court"**, *id.* at 526-527 and 529. The court then remanded with instructions that all claims **"be dismissed for lack of jurisdiction."** *id.* 533]; ***Coger v. Board of Regents of The State of Tennessee***, 209 F.3d 485, 486 (6th Cir. 2000) [**"In light of *Kimel*, we conclude that the faculty members cannot maintain their ADEA suit against the University, a state employer."** Case dismissed.]; ***Sims v. University of Cincinnati***, 219 F.3d 559, 566 (6th Cir. 2000) [Based on ***Kimel*** the Sixth Circuit held that the federal Family and Medical Leave Act ("FMLA") was **"not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment. The FMLA's purported abrogation of the States' sovereign immunity is accordingly invalid. We emphasize, however, the jurisdictional nature of this ruling: private litigation to enforce the FMLA against the states may not proceed in federal court. . . . Private plaintiffs may repair to state court."** (Emphasis added).]; ***Stevens v. Illinois Department of Transportation***, 210 F.3d 732, at 24 (7th Cir. 2000) [Based on ***Kimel***, the Court concluded **"that the district court did not have subject matter jurisdiction to hear this [ADA] case. We vacate the district court's entry of judgment in favor of the defendant and dismiss this case for lack of subject matter jurisdiction"** (emphasis added).]; ***Erickson v. Board of Governors of State Colleges and Universities***, 207 F.3d 945, 952 (7th Cir. 2000) [***Kimel*** requires dismissal of ADA claims without prejudice to refiling in State Court. **". . . *private***

litigation to enforce the ADA may not proceed in *federal* court. *Erickson* may repair to Illinois court. . ."]; ***Walker v. Illinois Department of Corrections***, 213 F.3d 344, 346-347 (7th Cir. 2000) [Applying reasoning of ***Kimel*** to ADA cases, the Court held that Title I of the ADA was unconstitutional under the 11th Amendment and § 5 of the 14th Amendment and vacated the district court's judgment based thereon. **"The judgment of the district court is vacated, and the case is remanded with instructions to dismiss the ADA claim, without prejudice, for want of jurisdiction."** (Emphasis added).]; and ***Stanley v. Wisconsin Department of Corrections***, 213 F.3d 340, 344 (7th Cir. 2000) [A companion case to ***Walker***, ***supra***, under the ADA to the same effect.]; ***Fromm v. Veteran's Affairs***, 220 F.3d 887, 890 (8th Cir. 2000). [**"Under this rule [FRCP 12(h) (3)], either the court or any party may raise an issue of subject-matter jurisdiction at any time, and the Eleventh Amendment is regarded, at least for this purpose, as going to subject-matter jurisdiction."** (Emphasis added). The court held that failure to raise the subject-matter jurisdiction defense under Eleventh Amendment prior to ***Kimel*** was not a waiver of that defense].

The different manners in which various federal Circuit Courts of Appeals approach the effect of the Eleventh Amendment on subject matter jurisdiction is in conflict. Particularly given the recent Eleventh Amendment activity in federal courts, this inconsistency presents inequity and uncertainty in the interpretation and application of Supreme Court precedent such as that established in ***Kimel***. Whether there exists post-***Kimel*** federal court subject matter jurisdiction nationwide for private claims against state employers under the ADEA should not be left to depend on what Circuit in which a party's case happens to arise.

ARGUMENT 3

This Court Should Now Settle the Question of the Effect of Eleventh Amendment Immunity on Subject Matter Jurisdiction

The historical aspects of the Eleventh Amendment have formed the basis of much recent discourse and dispute in Supreme Court decisions, particularly in dissent. See ***Alden v. Maine***, 527 U.S. 706, 119 S. Ct. 2240 (1999); ***College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Board***, 527 U.S. 666, 119 S. Ct. 2219 (1999); ***Florida Prepaid Postsecondary Ed. Expense Board v. College Savings Bank***, 527 U.S. 627, 119 S. Ct. 2199 (1999); ***Seminole Tribe of Florida v. Florida***, 517 U.S. 44, 116 S. Ct. 1114 (1996); ***Pennsylvania v. Union Gas Co.***, 491 U.S. 1, 109 S. Ct. 2213 (1989). The discussion in these cases highlights the historical and present uncertainty of the relationship of the Eleventh Amendment to the power of the federal judiciary under Article III of the Constitution.

From ***Clark v. Barnard***, 108 U.S. 436, 447, 2 S. Ct. 878 (1883) to ***Ford Motor Co. v. Department of Treasury***, 323 U.S. 459, 65 S. Ct. 347 (1945), Eleventh Amendment immunity went from being characterized as a "personal privilege" which a state may waive at its pleasure to a deprivation of subject matter jurisdiction. In 1974, in ***Edelman v. Jordan***, 415 U.S. 651, 678, 94 S. Ct. 1347 (1974), the Supreme Court noted that sovereign immunity had not been raised in the trial court in that case but was considered without objection by the Court of Appeals and the Supreme Court itself because, since ***Ford Motor Co., supra***, it had been settled that Eleventh Amendment immunity "**sufficiently partakes of the nature of a jurisdictional bar**" so that it need not be first raised in the trial court. ***Edelman,***

supra, 415 U.S. at 677-678. In ***Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinea***, 456 U.S. 694, 102 S. Ct. 2099 (1982), the Supreme Court discussed the differences between *in personam* and subject matter jurisdiction relative to Article III power of the federal judiciary noting that "**no action of the parties can confer subject -matter jurisdiction upon a federal court**". ***Id.*** at 501.

In ***Calderon v. Ashmus***, 523 U.S. 740, 118 S. Ct. 1694 (1998), the Supreme Court observed in a footnote that the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power but also that it is not coextensive with Article III judicial power. ***Calderon, supra***, 523 U.S. at 977, nt 2. The Court relied on ***Idaho v. Coeur d' Alene Tribe of Idaho***, 521 U.S. 261, 267, 117 S. Ct. 2028 (1997) and ***Patsey v. Board of Regents of Florida***, 457 U.S. 496, 515, 102 S. Ct. 2557 (1982) in making this observation.

In 1998, the Supreme Court in ***Wisconsin Dep't. Of Corrections v. Schacht***, 524 U.S. 381, 118 S. Ct. 2047 (1998), held that the presence of claims in that case that were barred by the Eleventh Amendment did not destroy removal jurisdiction over nonbarred claims. The unanimous Opinion, upon which the Ninth Circuit relied in the instant case, stated that the Eleventh Amendment grants the state a legal power to assert sovereign immunity should it choose to do so and that a court need not raise it on its own. ***Wisconsin, supra***, 524 U.S. at 371. However, in the same Opinion, the Court explicitly recognized **that it has not yet decided whether Eleventh Amendment immunity is a matter of subject matter jurisdiction**. ***Id.*** at 374. Justice Kennedy's concurring Opinion in the case observed the "**hybrid nature of the jurisdictional bar erected by the Eleventh**

Amendment" and expressed that the Court itself has noted the inconsistency between approaching sovereign immunity like *in personam* jurisdiction and at the same time discussing such immunity in terms of judicial power and subject matter jurisdiction. ***Id.*** at 376.

As the Ninth Circuit Court of Appeals discussed in ***Hill v. Blind Industries and Services of Maryland***, 179 F.3d 754, modified at 201 F.3d 1186, (9th Cir. 1999), such "hybrid nature" of Eleventh Amendment immunity is the judicial equivalent of being "almost pregnant". Either the Eleventh Amendment limits the Court's subject matter jurisdiction, in which case it can never be waived, or else it is not a "jurisdictional bar" as coined for the first time by the Supreme Court in ***Edelman, supra***.

The Ninth Circuit Court of Appeals in this case decided that Eleventh Amendment immunity operated solely as an affirmative defense, notwithstanding years of Supreme Court references to its "jurisdictional bar". Astonishingly, such approach would mean, and does mean if the Ninth Circuit's decision in this case is left to stand, that the Supreme Court's holding in ***Kimel, supra***, has no bearing at all on this ADEA case against a state agency. The important question of the nature of sovereign immunity and its effect on subject matter jurisdiction in pending cases is an important question of federal law that should now be settled by this Court in this case.

CONCLUSION

For all of the reasons identified herein, a writ of *certiorari* should issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case and, ultimately, to vacate the judgment below and dismiss the

matter without prejudice to the Petitioners pursuing their state law claims in California state court, a result dictated by ***Kimel, supra***, and consistent with the recognition that Eleventh Amendment immunity does indeed invoke the "jurisdictional bar".

Respectfully submitted,

/s/_____

GARY L. OLIMPIA
Counsel of Record
OLIMPIA, WHELAN & LIVELY
2502 Stevens Creek Blvd.
San Jose, CA 95128-9973
(408) 971-7252

Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed October 25, 2000]

No. 99-15384
D.C. No. CV-96-04108-CRB

JOSEPH KATZ; ROGER MOORE, on behalf of themselves and others similarly situated,
Plaintiffs-Appellants,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA; LAWRENCE LIVERMORE NATIONAL LABORATORY; ERNEST ORLANDO LAWRENCE BERKELEY NATIONAL LABORATORY,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted
June 15, 2000—San Francisco, California

Before: Mary M. Schroeder, Michael Daly Hawkins and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Schroeder

OPINION

SCHROEDER, Circuit Judge:

This age discrimination case is brought under both the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, and the California Fair Employment and Housing Act (FEHA), Cal. Gov't Code §§ 12941 *et seq.* It challenges the State of California's offer of a new early retirement incentive program to members of one retirement plan, whose average age was 55, and not to members of another retirement plan, whose average age was 60. Plaintiffs appeal the judgment in favor of defendants and raise, for the first time in a motion to dismiss the appeal, a threshold challenge to the district court's jurisdiction over the suit in light of the Supreme Court's holding in *Kimel v. Florida Bd. of Regents*, ___ U.S. ___, 120 S. Ct. 631 (2000), that the states have Eleventh Amendment immunity from suits under the ADEA.

The case is unusual, for it is the state that asserts that it has waived its immunity and the plaintiffs who assert that the state has not. We agree with the state that it has waived its immunity by consenting to the prosecution of this case through trial and by expressly waiving any Eleventh

Amendment defense in this case. On the merits, we affirm the district court's judgment dismissing as a matter of law the plaintiffs' disparate impact claim. Plaintiffs cannot prevail on that claim because any disparity in the impact of the state's decision was not on account of age but on account of retirement plan membership. We also affirm the court's entry of judgment following the jury's verdict in favor of the defendants on plaintiffs' disparate treatment claim. There was no error in the conduct of the trial.

BACKGROUND

Pursuant to a contract with the United States Department of Energy, the University of California manages the work of the Lawrence Livermore National Laboratory, the Lawrence Berkeley National Laboratory, and the Los Alamos National Laboratory. Prior to 1961, the employees of these national laboratories were participants in the Public Employees Retirement System (PERS), a statewide retirement system administered by the State of California. Beginning in 1961, however, the University of California Retirement Plan (UCRP) was offered to new employees, and no other lab employees became members of PERS.

In 1993, pressure to downsize the laboratories resulted in the creation of a voluntary early retirement incentive program, known as VERIP III, for UCRP members. To be eligible for the program, employees had to be at least 50 years old with at least five years of service. By the time VERIP III was offered, the population of eligible UCRP members numbered approximately 4,425, while the number of eligible PERS members was approximately 438. The demographic analyses conducted by the University as part of

its cost analysis revealed that the average age of UCRP members eligible for VERIP III was 55, with an average of 18.7 years of service, while the average age of potentially eligible PERS members was 60.51 years, with an average of 34.19 years of service.

The costs of offering VERIP III to UCRP members were covered by surplus funds in the UCRP program. The estimated cost of offering a companion to VERIP III to PERS members was approximately $30 million. Although the University considered offering to PERS members a program equivalent to VERIP III, the President of the University of California announced on August 3, 1994 that VERIP III would not be extended to PERS members.

Plaintiffs, members of the PERS program, brought this suit in federal district court on November 14, 1996, setting forth disparate impact and treatment age discrimination claims under the ADEA and FEHA. The district court denied the University's motions to dismiss and for summary judgment, and eventually certified the case as a class action. Just prior to trial, on January 20, 1999, the district court held as a matter of law that plaintiffs could not establish a prima facie case of disparate impact age discrimination and precluded plaintiffs' counsel from referring to that claim during trial. Also prior to trial, the district court granted the University's motion in limine to preclude plaintiffs from presenting evidence that the University could have allowed plaintiffs to transfer from PERS to UCRP in order to participate in VERIP III. At the end of the trial, the jury reached a unanimous verdict in favor of the University. This appeal followed.

WAIVER OF IMMUNITY

As a threshold matter, plaintiffs now contend that this case must be dismissed in light of *Kimel*, in which the Supreme Court held that Congress' attempt to extend the ADEA to the states by abrogating their Eleventh Amendment immunity was an inappropriate exercise of Congress' lawmaking authority under § 5 of the Fourteenth Amendment. Although the ADEA is a proper exercise of Congress' Article I Commerce Clause power, the Court held that such power does not include the ability to subject the states to suits by private individuals. *See Kimel*, ___ U.S. at ___, 120 S. Ct. at 643 (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996)). Before the district court, the state had asserted the Eleventh Amendment as a defense. The Court therefore dismissed Kimel's suit.

Plaintiffs assert that the Supreme Court's decision in *Kimel* eliminated the basis for federal subject matter jurisdiction over this suit by striking down the provision in the ADEA conferring jurisdiction over age discrimination suits against state agencies. We disagree. Nothing in *Kimel* suggests that the Court intended to remove the statutory jurisdictional basis for age discrimination suits against a state or its agencies. It held that on account of Eleventh Amendment immunity the states can not be compelled to submit to the jurisdiction of the federal courts in such suits.

California may therefore waive its Eleventh Amendment immunity on a case-by-case basis, as we hold it has here, and subject itself to suit under the ADEA. The Eleventh Amendment was never asserted as a defense by the University before the district court, and the state has

submitted a declaration of the general counsel for the Regents of the University of California which purports to waive the University's Eleventh Amendment immunity for purposes of this litigation. As we recently noted, "The Eleventh Amendment . . . does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it." *Hill v. Blind Ind. & Services of Maryland,* 179 F.3d 754, 760 (9th Cir. 1999) (quoting *Wisconsin Dep't of Corrections v. Schacht,* 524 U.S. 381, 389 (1998)). This conclusion is consistent with prior Supreme Court case law. *See, e.g., Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 241 (1985); *Patsy v. Board of Regents of Fla.,* 457 U.S. 496, 515 n.19 (1982); *Gardner v. New Jersey,* 329 U.S. 565, 574 (1947). Here, since the state has expressly disavowed Eleventh Amendment immunity as a defense, thereby unequivocally waiving it, federal jurisdiction exists and plaintiffs' motion to dismiss the appeal must be denied. *See Atascadero,* 473 U.S. at 241 (state immune absent an unequivocal waiver specifically applicable to federal jurisdiction).

DISPARATE IMPACT CLAIM

The ADEA prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age." 29 U.S.C. § 623(a)(1). Although the Supreme Court has specifically left the question open, *see Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610 (1993), in this circuit, disparate impact claims are cognizable under the

ADEA. *See EEOC v. Local 350, Plumbers and Pipefitters*, 998 F.2d 641, 648 n.2 (9th Cir. 1993); *EEOC v. Borden's Inc.*, 724 F.2d 1390 (9th Cir. 1984). *But see Mullin v. Raytheon Co.*, 164 F.3d 696, 703 (1st Cir. 1999) (ADEA does not provide cause of action for disparate impact); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1007 (10th Cir. 1996) (same); *EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1076-78 (7th Cir. 1994) (same).

Generally, in order to prevail on a disparate impact claim of age discrimination, a plaintiff must prove that a challenged employment policy or practice, while facially neutral, has a disparate impact on certain employees "because of their membership in a protected group," *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994 (1988), which under the ADEA consists of "individuals who are at least 40 years of age." 29 U.S.C. § 631(a). To state a prima facie case under a disparate impact theory, a plaintiff must demonstrate "(1) the occurrence of certain outwardly neutral employment practices, and (2) a significantly adverse or disproportionate impact on persons of a particular [age] produced by the employer's facially neutral acts or practices." *Palmer v. United States*, 794 F.2d 534, 538 (9th Cir. 1986) (brackets in original). We apply the same analytical framework to claims brought under FEHA. *See Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1219 (9th Cir. 1998).

The district court dismissed plaintiffs' adverse impact claim just prior to trial, concluding that plaintiffs were "unable to set forth a substantial statistical disparity that would raise an inference of intentional discrimination, and . . . unable to demonstrate how the University's decision–absent discriminatory intent– could have harmed the plaintiffs

because of age." Plaintiffs argue that the University's decision to offer VERIP III only to UCRP members had a disparate impact upon PERS members because (1) PERS members tended, on average, to be about 5 years older, and (2) it was increasingly likely that older employees would be members of the PERS program.

It should be noted that all the employees potentially eligible for VERIP III, whether members of PERS or UCRP, were within the class of persons protected by the ADEA. Although the Ninth Circuit has not expressly addressed the issue, some circuits have held that claims based on the adverse impact of a policy among sub-classes within a larger protected class are not cognizable. *See, e.g., EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999); *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102 (2d Cir. 1997). We need not reach that issue, however, because we hold that plaintiffs failed to demonstrate causation, which requires substantial statistical evidence sufficient to raise an inference that the disparate impact fell upon employees of a protected age group. *See Watson*, 487 U.S. at 994.

While the plaintiffs can certainly show that they were treated differently on the basis of their membership in the PERS program, their evidence demonstrates that only 238 of the 895 employees at the laboratories age 60 or over (roughly 27 percent) were adversely impacted by the University's decision. Given the legitimate reason advanced for the University's decision, the plaintiff's statistical evidence is insufficient to raise an inference that the disparate impact fell upon employees by virtue of their membership in a protected age group. *See Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990) (concluding that plaintiff's statistical

evidence was insufficient to raise inference of causation where other evidence demonstrated that workforce after employment action was applied was older than the workforce beforehand). As in *Rose*, the statistical evidence of disparate impact upon employees age 60 or over is minimal compared to the number of employees of that age group not adversely affected by the University's decision.

Plaintiffs rely most heavily on *Arnett v. California PERS*, 179 F.3d 690 (9th Cir. 1999), *vacated in light of Kimel*, 120 S. Ct. 930 (2000). In *Arnett*, former California state employees challenged the California Public Employees' Retirement Law's method of calculating disability benefits. Under Cal. Gov't Code § 21417, employees who were injured on the job and retired with a disability were paid according to a formula that took into account "potential years of service" by subtracting an employee's age at hire from the presumed retirement age of 55. *See id.* at 693. As a result, an employee hired at age 35 would receive 40% of her final compensation while an employee hired at age 50 would receive only 10%. *See id.* at 695. We reversed the district court's dismissal of the plaintiffs' adverse impact claim, holding that "[h]aving alleged that the consequences of section 21417 fall more harshly on 'those employees hired at age 40 and over,' and documenting the impact of the benefit calculations, the Employees adequately stated a disparate impact claim." *Id.* at 697.

In *Arnett*, however, the impact of the policy was directly related to an employee's age; the older an employee was at the time of hire, the less she received in disability benefits. No such direct nexus exists here. At best, plaintiffs have demonstrated only that the average age of the PERS

members was 5 years older than the average age of eligible UCRP members, and plaintiffs concede that numerous UCRP employees older than the average PERS member were offered VERIP III. The factor that determines an employees' eligibility to participate in VERIP III is thus not an employee's age itself, but instead whether that employee is a member of UCRP. *See Rose*, 902 F.2d at 1425. Accordingly, plaintiffs failed to demonstrate the requisite causal link for a disparate impact claim, and the district court did not err by dismissing the claim prior to trial.

EVIDENTIARY RULING

Prior to trial of plaintiffs' disparate treatment claim, the district court excluded evidence and argument that the University could have allowed plaintiffs to transfer to UCRP and participate in VERIP III. This issue was originally raised in a motion in limine by the University seeking to exclude evidence of available alternatives to the challenged policy or practice, including the possibility of transfer from PERS to UCRP. The district court granted the motion, concluding that allowing such transfers, without the PERS members having contributed to or participated in UCRP, would likely violate the California Constitution. After intervening law called into question the district court's conclusion that permitting transfers between programs would violate state law, and after plaintiffs' disparate impact claim had been dismissed, plaintiffs asserted that the transfer evidence was admissible with respect to their disparate treatment claim to demonstrate discriminatory intent. The district court concluded that because the University reasonably believed at the time it allegedly denied transfers into UCRP that state law prohibited such transfers, a jury could not reasonably infer that the

University's failure to permit the transfers was evidence of discriminatory intent. Nonetheless, the court offered to allow plaintiffs to question a University representative outside the presence of the jury as an offer of proof. Plaintiffs declined to make such an offer.

The district court did not abuse its discretion by refusing to admit evidence regarding the possibility of transfer between programs. The thrust of plaintiffs' argument before the district court was that transfer from PERS to UCRP was possible at the time VERIP III was offered and that the University's failure to explore the possibility of transfer was evidence of discriminatory intent. Plaintiffs did not dispute the reasonableness of the University's belief in 1993 and 1994 that state law would prohibit transfer between the programs, and any subsequent change in the law had no bearing on that earlier belief. As argued by plaintiffs, the evidence would have shown only that at the time the University was informing members of the plaintiff class that transfer was impossible, they were acting on legal advice that was later shown to have been incorrect. Under these circumstances, the district court's conclusion that the jury could not reasonably infer a discriminatory motive on the part of the University through evidence of the possibility of transfer between programs was not an abuse of discretion. *See Gilbrook v. City of Westminster*, 177 F.3d 839, 858 (9th Cir.), *cert. denied*, 120 S. Ct. 614 (1999). Insofar as plaintiffs contend on appeal that they could have proven additional facts relevant to their disparate treatment claim, plaintiffs' failure to make an offer of proof–particularly once invited to do so by the district court–precludes consideration of those contentions. *See Heyne v. Caruso*, 69 F.3d 1475, 1481 (9th Cir. 1995).

CONCLUSION

For the foregoing reasons, plaintiffs' motion to dismiss the appeal is DENIED. The district court's dismissal of plaintiffs' adverse impact claim and evidentiary ruling at trial are AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Filed February 5, 1999]

No. C 96-4108 CRB

JOSEPH E. KATZ, ROGER P. MOORE, on behalf of themselves and others similarly situated, *Plaintiffs*,	)
v.	)
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *Defendant*.	)

JUDGMENT ON JURY VERDICT

This action came on for trial before the Court and a jury, The Honorable Charles R. Breyer, District Judge, presiding. The issues having been duly tried and the jury having duly rendered its verdict.

IT IS ORDERED AND ADJUDGED that:

Age was not a motivating factor in the University's decision not to offer an early retirement incentive to the plaintiffs.

Judgment is entered in favor of the defendant.

Dated: 2-4-99

/s/_____
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Filed February 5, 1999]

No. C 96-4108 CRB

JOSEPH E. KATZ, ROGER P. MOORE, on behalf of themselves and others similarly situated,
Plaintiffs,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Defendant.

SPECIAL VERDICT FORM

Dated: 2-4-99 /s/_____
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

WE, THE JURY IN THE ABOVE-CAPTIONED MATTER, HEREBY RENDER THE FOLLOWING SPECIAL VERDICT:

QUESTION: HAVE THE PLAINTIFFS PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT THE DEFENDANT INTENTIONALLY DISCRIMINATED

AGAINST THEM IN THAT AGE WAS A MOTIVATING FACTOR IN THE UNIVERSITY'S DECISION NOT TO OFFER AN EARLY RETIREMENT INCENTIVE TO THE PLAINTIFFS?

ANSWER: YES_____ NO__X__

Dated: 2-4-98 By: /s/_____
(Jury Foreperson)

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed December 13, 2000]

No. 99-15384
D.C. No. CV 96-04108-CRB

JOSEPH E. KATZ, ROGER P. MOORE, on behalf of themselves and others similarly situated,
Plaintiffs-Appellants,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, LAWRENCE LIVERMORE; NATIONAL LABORATORY; ERNEST ORLAND LAWRENCE BERKLEY NATIONAL LABORATORY,
Defendants-Appellees.

Before: SCHROEDER, Chief Judge, HAWKINS & FISHER, Circuit Judges.

ORDER

The panel as constituted above has voted to deny the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing and petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are therefore DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed January 28, 2000]

NO. 99-15384

JOSEPH E. KATZ and ROGER P. MOORE, on behalf of themselves and 128 others similarly situated,
Plaintiffs-Appellants,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Defendant-Appellee.

Appeal from a Judgment of the United States District Court for the Northern District of California
Case No. CV 96-04108 (CRB)

Honorable Charles R. Breyer,
United States District Judge

APPELLANTS' MOTION TO DISMISS APPEAL FOR LACK OF SUBJECT MATTER JURISDICTION AND TO ORDER DISMISSAL OF THE ENTIRE ACTION WITHOUT PREJUDICE TO REFILING IN STATE COURT

* * * * *

[page 1]

MOTION

Pursuant to the provisions of ***FRCP 12 (b) (1)*** and ***12 (h) (3)***, Plaintiffs and Appellants hereby move to dismiss this appeal for lack of original federal subject matter jurisdiction and for an order remanding this case to the District Court with instructions to dismiss this entire action without prejudice to the Appellants' ability to re-file their state law age discrimination claims against the University of California in a California state court pursuant to California's Fair Employment and Housing Act, ***California Government Code § 12941*** ("FEHA").

As of January 11, 2000, this appeal was fully briefed and awaiting assignment to a panel of Judges. However, as a result of the U.S. Supreme Court's landmark decision in ***Kimel v. Florida Board of Regents***, 00 C.D.O.S. 229; 2000 U.S. LEXIS 498 (January 11, 2000), there is no longer any original subject matter jurisdiction in Federal Court for this ADEA age discrimination class action by private citizens against an agency of the California State government, i.e., the Regents of the University of California. In ***Kimel v. Florida Board of Regents***, *supra*, in a five-four decision the Supreme

Court ruled that the specific provision of the ADEA that permits private citizens to bring age discrimination cases in Federal Court against state public entities and agencies is unconstitutional under the Eleventh and Fourteenth Amendments of the Federal Constitution.

This unexpected decision from the Supreme Court completely eliminates any basis for Federal Court jurisdiction for all ADEA age discrimination claims against state public entitles or agencies of state governments. By eliminating original subject matter jurisdiction in Federal Court under the ADEA on constitutional grounds, the Supreme Court's decision also eliminates any supplemental jurisdiction the District Court may have had over the Plaintiffs' California state law age discrimination claims under FEHA. As a result, all proceedings in the District Court and in this Court have been nullified as having been conducted without any original or supplemental subject matter jurisdiction.

Because of this drastic new development, the Appellants in this case have no choice but to move to dismiss this appeal for lack of original federal subject matter jurisdiction and for an order remanding this case to the District Court with instructions to dismiss this entire action without prejudice to the Appellants' ability to re-file their FEHA age discrimination claims against the University of California in a California state court.

FACTUAL AND PROCEDURAL BACKGROUND

This is a major age discrimination class action on behalf of 130 now mostly retired employees of the Lawrence Berkeley and Lawrence Livermore National Laboratories

("LBL" and "LLNL") against the University of California ("UC"), which manages these national laboratories for the federal Department of Energy ("DOE"). In 1993 the Plaintiffs were members of a group of the oldest and most senior laboratory employees at a time when the national laboratories were downsizing because of the elimination of research projects following the end of the cold war. To accomplish this downsizing, UC extended a nearly $275 million Voluntary Early Retirement Incentive Program ("VERIP III") to a group of the Plaintiffs' co-workers who were not only substantially younger on average than the Plaintiffs (i.e. 54 vs. 59), but also had only about half the number of years of service on average as did the Plaintiffs (i.e. 17 vs. 34) (ER 65 and 72). To be eligible for the program, an employee had to be 50 years of age or older with at least five years of service. Although all of the Plaintiffs satisfied these eligibility criteria, they were all completely excluded.

The fact that the Plaintiffs were substantially older and had twice as many years of service, on average, as their co-workers who were offered VERIP III was the result of action by UC in **1961** that separated the workforce at the laboratories into two retirement systems. All new employees at the national laboratories from then on were required to enroll in the University of California Retirement Plan ("UCRP"), whereas all pre-existing laboratory employees from then on remained in the Public Employees' Retirement System ("PERS"), a retirement system which is administered by the State. Both retirement systems were funded at the national laboratories by the federal government through employer contributions from DOE. All of the Plaintiffs were already employed at the national laboratories before 1961,

and therefore in 1993 they were all members of PERS and they all had between 32 and 40 years of continuous service.

On August 3, 1994, UC President Peltason issued a memorandum to the laboratory directors communicating UC's decision not to extend VERIP III to the PERS members. (ER 76, Ex. 126) Thereafter, age discrimination complaints were filed by the Plaintiffs with the California Department of Fair Employment and Housing and the EEOC. (ER 77, Ex. 16) Both agencies investigated the complaints and issued right to sue letters on January 10, 1995 and on October 11, 1996 respectively. (ER 1, Exhibits to Complaint).

The Complaint setting forth both federal and state disparate impact and disparate treatment age discrimination claims was filed in the District Court on November 14, 1996. (ER 1). On October 5, 1998, the District Court certified this case as a federal ADEA age discrimination class action on behalf of 130 PERS members at LBL and LLNL, each of whom had filed a Consent to Join the Action with the District Court. (ER 20) In October and November 1998 the District Court issued three pre-trial orders establishing the measure of damages should the Plaintiffs prevail, the net effect of which was to establish the present value of Plaintiffs' lost retirement benefits at approximately $15 million or an average of approximately $115,000 per Plaintiff. (ER 23, 24 and 25).

Jury trial commenced with jury selection on January 19, 1999. Notwithstanding the fact that UC's motion to dismiss Plaintiffs' disparate impact claims had been denied, UC's motion for interlocutory appeal of that ruling had been denied, and UC's motion for summary judgment had been denied, on January 20, 1999, shortly before opening

statements to the jury, the District Court ruled *sua sponte* and as a matter of law that the Plaintiffs' evidence could not even establish a prima facie case in support of their disparate impact claims sufficient to shift the burden to UC to prove business necessity, and refused to permit Plaintiffs' counsel to refer to the disparate impact claims in opening statement. (ER 30, 31, and 32) On January 27, 1999, the District Court issued its written order in support of its dismissal of the Plaintiffs' disparate impact claims (ER 34). The Plaintiffs' state law age discrimination claims under FEHA were never specifically addressed by the District Court.

The Plaintiffs' disparate treatment claims were then tried to the jury from January 20 through February 3, 1999. On February 4, 1999, almost immediately after the Court delivered a strongly worded "curative instruction" to the deliberating jury on the issue of disparate treatment requested by UC (ER 42), the jury reached a unanimous defense verdict for UC, ruling that the older age status of the Plaintiffs was not one of the actual motivating factors in UC's decision not to include the PERS members in the 1993-1994 early retirement incentive program. (ER 43) Final Judgment in favor of UC was entered February 5, 1999 (ER 44), and the Notice of Appeal was filed March 4, 1999. (ER 45). As of January 11, 2000 the appeal was fully briefed and awaiting assignment to a panel of judges.

ARGUMENT

I. IN *KIMEL v. FLORIDA BOARD OF REGENTS*, THE U.S. SUPREME COURT DECLARED THE SPECIFIC JURISDICTIONAL PROVISION OF THE ADEA UPON WHICH THIS CASE IS BASED TO BE UNCONSTITUTIONAL AND THEREBY ELIMINATED ORIGINAL FEDERAL SUBJECT MATTER JURISDICTION IN THIS CASE

The Federal Age Discrimination in Employment Act (ADEA) was enacted by Congress in 1967. When first passed, the ADEA applied only to private employers. However, in 1974, in a statute consisting primarily of amendments to the Fair Labor Standards Act (FLSA), Congress extended application of the ADEA's substantive requirements to the States. Congress accomplished that expansion in scope by a simple amendment to the definition of "employer" contained in ***29 U.S.C. § 630(b):*** **"The term [employer] also means . . . a state or political subdivision of a state and any agency or instrumentality of a state or political subdivision of a state . . . ."**

In 1983 the U.S. Supreme Court upheld the constitutional validity of the 1974 extension of the ADEA to state and local governments in ***EEOC v. Wyoming***, 460 U.S. 226, 243; 75 L.Ed.2d. 18; 103 S.Ct. 1054 (1983).

It was not until 1998 that any Federal Circuit Court of Appeals held that the 1974 amendments to the FLSA (which extended application of the ADEA's substantive requirements to the States) was unconstitutional as an invalid abrogation of the States' Eleventh Amendment sovereign immunity. In ***Kimel, et al. v. Florida Board of Regents***, 139 F.3d. 1426, 1433 (11th Cir. 1998) the Eleventh Circuit held that the Fourteenth Amendment does not authorize the ADEA to abrogate the States' Eleventh Amendment sovereign immunity. The U.S. Supreme Court then granted *certiorari* to resolve the conflict among the Federal Courts of Appeal on the question of whether the ADEA validly abrogates the States' Eleventh Amendment sovereign immunity.

On January 11, 2000, the very day that the last brief was filed on this appeal, the Supreme Court decided ***Kimel v. Florida Board of Regents***, 00 C.D.O.S. 229; 2000 U.S. LEXIS 498 (January 11, 2000). In a five to four decision written by Justice O'Connor, the Court held that although **"Section 5 of the Fourteenth Amendment does grant Congress the authority to abrogate the States' sovereign immunity, [*33] . . . the ADEA is not 'appropriate legislation' under Section 5 of the Fourteenth Amendment" [*38]** and therefore **" . . . the ADEA is not a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment. The ADEA's purported abrogation of the States' sovereign immunity is accordingly invalid." [*53]** The Court concluded that: **"Because the ADEA does not**

validly abrogate the States' sovereign immunity, however, the present suits must be dismissed." [*55] [1].

The ***Kimel*** case was a consolidation of three separate age discrimination cases against agencies of the Florida and Alabama state governments. The ***Kimel*** consolidated case was a disparate impact age discrimination case against the Florida Board of Regents by faculty and librarians of Florida State University challenging the refusal of the Board of Regents to allocate funds to provide previously agreed-upon market rate adjustments to the salaries of eligible University employees. The plaintiffs had filed suit in federal court under both the ADEA and the parallel age discrimination provisions of the Florida Civil Rights Act.

The other two consolidated cases were age discrimination cases filed by faculty members against an Alabama state university and by state prison employees against the Florida Department of Corrections.

Significantly, the Supreme Court held that, notwithstanding the dismissal of their federal ADEA claims on constitutional jurisdictional grounds, the state employees could still pursue their age discrimination claims under the state age discrimination statutes that exist in almost every state in the union, including California:

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[1] Page references are to the temporary pagination in the LEXIS version of the opinion pending release of the final published version.

> **Our decision today does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers. We hold only that, in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits by private individuals. State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union. (fn) Those avenues of relief remain available today, just as they were before this decision.**
>
> **(fn) . . . Cal. Govt. Code Ann. § 12900 et seq. (West 1992 and Supp. 1999) . . . [*53-54]** (Emphasis added).

Therefore, the Supreme Court made it explicitly clear that the Court's decision invalidating the provisions of the ADEA that allowed age discrimination suits by private citizens against states and agencies thereof does not in any way affect relief available under state age discrimination statutes such as FEHA.

II. THE ELIMINATION OF ORIGINAL FEDERAL JURISDICTION UNDER THE ADEA ON CONSTITUTIONAL GROUNDS ALSO ELIMINATES SUPPLEMENTAL FEDERAL JURISDICTION OVER THE APPELLANTS' STATE LAW CLAIMS UNDER FEHA; APPELLANTS ARE THEREFORE ENTITLED TO DISMISSAL OF THIS ENTIRE ACTION WITHOUT PREJUDICE TO REFILING THE STATE LAW CLAIMS IN STATE COURT UNDER FEHA

Before the Supreme Court's decision in ***Kimel v. Florida Board of Regents***, supra, the District Court and this Court had purported supplemental jurisdiction over the Plaintiffs' state law age discrimination claims under **28 U.S.C. § 1367 (a)** which provides in relevant part as follows:

> **§ 1367. Supplemental jurisdiction . . .**
>
> **(a) . . . <u>in any civil action of which the district courts have original jurisdiction</u>, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.** (Emphasis added).

In ***Kimel v. Florida Board of Regents***, supra, the Supreme Court held that the District Court in those cases never had any original federal subject matter jurisdiction under the ADEA and therefore ordered dismissal, not only of the plaintiffs' federal claims under the ADEA, but also of the plaintiffs' state age discrimination claims being asserted under supplemental jurisdiction. However, the Supreme Court dismissed the plaintiffs' state law age discrimination claims without prejudice to their right to re-file them in state court. Therefore, since the District Court in this case never had any original federal jurisdiction under the ADEA, the plaintiffs' California state law age discrimination claims asserted in federal court under the supplemental jurisdiction statute must also be dismissed without prejudice to being re-filed in state court.

This virtually self evident proposition was specifically applied by the Ninth Circuit in 1996 in ***Randolph v. Budget Rent-A-Car and Saudi Arabian Airlines***, 97 F.3d. 319, 329 (9th Cir. 1996). In that case, an employee of Saudi Arabian Airlines, which is owned by the government of Saudi Arabia, flew to Los Angeles, rented a car from Budget, and negligently collided with the plaintiff, Randolph, causing severe personal injuries. The Randolphs filed suit against Saudi Arabian Airlines, its negligent employee, and Budget in California state court. Saudi removed the action to Federal District Court and asserted the Foreign Sovereign Immunity Act as a defense.

The District Court rejected that defense and granted summary judgment in favor of the plaintiff and ultimately rendered a substantial judgment against Saudi Arabian

Airlines and a judgment for the $30,000 statutory limit of liability against Budget under California state law.

On the appeal, the Ninth Circuit held that Saudi Arabian Airlines was immune from suit under the Foreign Sovereign Immunity Act and that therefore there was no original federal subject matter jurisdiction. The Ninth Circuit reversed and ordered dismissal of the federal claims against the Airline. The Court also held that the failure of original subject matter jurisdiction for the federal claim eliminated any supplemental jurisdiction over the state law claims against Budget and dismissed the claims against Budget. In so doing, the Court held as follows:

> **A district court may exercise supplemental jurisdiction over claims which are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III . . . . " 28 U.S.C. § 1367. However, when original jurisdiction does not exist for the principal claim, federal courts may not exercise supplemental jurisdiction over the remaining pendant claims. Simply put failure of original jurisdiction precludes application of supplemental jurisdiction.**
>
> **Where a Court of Appeals finds a defendant to be an immune sovereign under the FSIA, all pendant state claims must be either dismissed or remanded to state court. To hold otherwise would be in derogation of Article III's "case and controversy"**

requirement. U.S. Const. Art. III, § 2. Because this case was removed from state court by Saudia, the Randolphs' claims against Budget must be remanded to state court.

IV Conclusion

Because neither the commercial activity nor the tortious activity exception to the FSIA applies to this case, no federal jurisdiction exists for the Randolphs' claims against Saudia. Because there is no cause of action giving rise to original federal jurisdiction, all other claims must be remanded to state court. Therefore, the judgment of the district court against Saudia and Budget is reversed. The claims against Saudia are dismissed. We remand all remaining claims to the district court with instructions to remand the remaining causes of action to the Los Angeles Superior Court. (Emphasis added).

A dismissal for lack of subject matter jurisdiction pursuant to ***FRCP 12(b)(1)*** is not a dismissal on the merits, has no *res judicata* effect as to the Plaintiffs' pendant state law claims, and entitles the Plaintiffs to seek relief in state court without being bound by any adverse decisions made on their state law claims while they were pending in federal court pursuant to supplemental jurisdiction. See ***Nowak v. Ironworkers***, 81 F.3d. 1182, 1187-1188 (2th Cir. 1996). In that case, the Second Circuit's analysis of the distinction

between a dismissal for lack of subject matter jurisdiction under ***Rule 12(b)(1)*** and a dismissal for failure to state a claim under ***Rule 12(b)(6)*** makes it abundantly clear that the dismissal of this case because of the unconstitutionality of the jurisdictional provision of the ADEA that provided original subject matter jurisdiction in the first place is a classic dismissal for lack of subject matter jurisdiction under ***Rule 12(b)(1)***, and is not a dismissal for failure to set forth sufficient facts to state a claim for relief under ***Rule 12(b)(6)***. Therefore, the dismissal of the Plaintiffs' state law claims is not on the merits and can have no *res judicata* effect on the Plaintiffs' ability to re-file those claims in state court. See also ***Robinson v. Overseas Military Sales, Corp.***, 21 F.3d. 502, 507, fn. 4 (2nd Cir. 1994) and ***Cook v. Peter Kiewit Sons, Co.***, 775 F.2d. 1030, 1035 (9th Cir. 1985) to the same effect.

Finally, the supplemental jurisdiction statute itself specifically preserves Plaintiffs' state law claims while they are pending in Federal Court by tolling any statute of limitations that might be applicable to those claims. ***28 U.S.C § 1367 (d)*** specifically provides as follows:

> **(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.**

Therefore, the Plaintiffs and the Appellants will have at least 30 days after the dismissal of this action by the District Court, following remand from this Court, to file their age discrimination claims in state court under FEHA without any of the adverse rulings made by the District Court on the Plaintiffs' state law claims being in any way binding on the Plaintiffs.

CONCLUSION

The Supreme Court's decision in ***Kimel v. Florida Board of Regents***, supra, eliminated any basis for original subject matter jurisdiction in Federal Court under the ADEA on constitutional grounds, and also eliminated any supplemental jurisdiction the District Court may have had over the Plaintiffs' state law age discrimination claims. Therefore, all proceedings in the District Court and in this Court have been nullified as having been conducted without any original or supplemental subject matter jurisdiction. Therefore, the Plaintiffs and Appellants are entitled to a dismissal of this entire action without prejudice to the Appellants' ability to re-file their FEHA age discrimination claims against the University of California in a California state court.

Respectfully submitted,

Dated: January 27, 2000

OLIMPIA, WHELAN & LIVELY

By: /s/_____
GARY L. OLIMPIA

By: /s/_____
DAVID J. RUDE
Attorneys for Plaintiffs and Appellants

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed March 10, 2000]

NO. 99-15384

JOSEPH E. KATZ and ROGER P. MOORE, on behalf of themselves and 128 others similarly situated,
Plaintiffs-Appellants,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Defendant-Appellee.

Appeal from a Judgment of the United States District Court for the Northern District of California Case No. CV 96-04108 (CRB)

Honorable Charles R. Breyer, United States District Judge

APPELLEE'S OPPOSITION TO APPELLANTS' MOTION TO DISMISS APPEAL FOR LACK OF SUBJECT MATTER JURISDICTION

* * * * *

[page 1]

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs-Appellants Katz, *et al.* ("Katz") move to dismiss this appeal for lack of subject matter jurisdiction, and further request this Court to "order dismissal of the entire action without prejudice to refiling in state court." (Mot. to Dismiss caption) Katz contends that the Supreme Court's recent decision in *Kimel v. Florida Bd. of Regents,* ___U.S. ___, 120 S.Ct. 631 (Jan. 11, 2000), demands such a result.

Katz's arguments are entirely misplaced because (1) the Supreme Court in *Kimel* did not hold that federal courts are without original subject matter jurisdiction over claims brought against the states under the federal Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* (the "ADEA"); (2) Eleventh Amendment immunity is a defense akin to a "privilege'" that may be raised only by the State, it is not an automatic "jurisdictional bar," and (3) as it pertains to this lawsuit, the Eleventh Amendment immunity defense is waived. Accordingly, Katz's motion to dismiss must be denied.

II. PROCEDURAL HISTORY

On November 14, 1996, Katz filed suit against the University in United States District Court for the Northern District of California, claiming, *inter alia,* violation of the ADEA. *(See* Exh. 1, Katz's Compl., at 1) Defendant-

Appellee The Regents of the University of California (*See* "University") filed an Answer which included several affirmative defenses. The University did not, however, plead an affirmative defense based upon Eleventh Amendment immunity. (*See* Exh. 2, The University's Ans., at 6-9) Plaintiffs' age discrimination claims were litigated in the District Court for over two years, culminating in a ten day trial in January and February of 1999. The District Court dismissed Katz's disparate impact claims during the initial trial proceedings. Katz's disparate treatment claims were presented to the jury.[1] The jury returned a verdict in favor of the University.

Katz brought this appeal, seeking to reverse the District Court's dismissal of the disparate impact claim and challenging various evidentiary rulings. In their opening brief, Katz affirmatively stated that this Court has jurisdiction over the subject matter of this appeal. After the briefs of both parties were on file, however, Katz brought the instant motion to dismiss, claiming that the federal courts lack subject matter jurisdiction over the age discrimination claims. As set forth below, Katz's attempt to avoid the adverse findings of the District Court jury trial by claiming that the proceedings below are a nullity is based upon a spurious interpretation of *Kimel*.

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[1] Katz's age discrimination claims were brought under both the ADEA and the California Fair Employment and Housing Act. Katz pleaded and presented identical factual and legal arguments in support of the age discrimination claims.

The University's opposition to the instant motion to dismiss is timely filed under this Court's Order of February 9, 2000, granting the University's motion for an extension of time and setting the due date of March 10, 2000.

III. ARGUMENT

A. *Kimel v. Florida Bd. of Regents* Does *Not* Divest Federal Courts Of Original Subject Matter Jurisdiction Over ADEA Claims Brought Against A State

Katz contends that in *Kimel,* "the U.S. Supreme Court declared the specific jurisdictional provision of the ADEA upon which this case is based to be unconstitutional and thereby eliminated original federal subject matter jurisdiction in this case." (Mot. to Dismiss, at 6) Katz argues that *Kimel* nullifies the three years of federal court proceedings in this case, requiring them to bring this motion so that the entire action may be dismissed without prejudice so that they may re-litigate their claims in state court. (Mot. to Dismiss, at 2, 10-11)

Katz misinterprets and distorts the holding of *Kimel.* Contrary to Katz's assertions, *Kimel* does not divest the federal courts of original subject matter jurisdiction over ADEA claims brought against a state. Rather, in *Kimel*, the State argued that the ADEA claims were barred by its Eleventh Amendment immunity, and the Supreme Court held that Congress, by amending the ADEA to make its provisions applicable to the states, exceeded its authority under Section 5 of the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity. 120 S.Ct. at 640-50.

Katz further suggests that *Kimel* deems the statute unconstitutional as applied to states. But in fact, *Kimel* re-affirmed the constitutionality of the ADEA as a valid exercise of Congress's Article I Commerce Clause power. 120 S.Ct. at 642-43 (citing *EEOC v. Wyoming*, 460 U.S. 226, 243, 103 S.Ct. 1054, 75 L.Ed. 2d 18 (1983)).

Nowhere in *Kimel* does the Supreme Court analyze or even address the jurisdictional arguments asserted by Katz. The Court's focus in *Kimel* was upon the language used by Congress in the ADEA to abrogate the states' immunity under the Eleventh Amendment. The *ratio decidendi* of the Supreme Court's decision was that the ADEA's purported abrogation of the states' sovereign immunity is invalid, leaving the Eleventh Amendment immunity defense available to states in ADEA cases. Katz's interpretation of *Kimel as* presenting a jurisdictional bar to ADEA actions against a state is devoid of any reference or citation to the text of the Supreme Court's opinion. Katz simply leaps to the conclusion that *Kimel* "eliminated" or "destroyed" the federal courts' original jurisdiction to adjudicate ADEA cases brought against the states. In the process, Katz ignores a considerable body of Supreme Court and Ninth Circuit case law concerning the Eleventh Amendment immunity defense.

B. Eleventh Amendment Immunity Is A Defense Akin To A "Personal Privilege" That May Be Raised Only By the State, And Is Not An Automatic "Jurisdictional Bar"

Katz's simplistic and overreaching interpretation of the *Kimel* decision conveniently glosses over the crux of the

doctrine at issue in *Kimel:* a state's Eleventh Amendment immunity defense.[2]

The Eleventh Amendment grants a state immunity from suits brought in federal court by its own citizens as well as citizens of another state. U.S. Const. Amend. XI;[3] *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 100, 104 S.Ct. 900, 79 L.Ed. 2d 67 (1984). However, *"[t]he Eleventh Amendment bar to suits against states in federal court is not absolute." Broughton Lumber Co. v. Columbia River Gorge Comm.,* 975 F.2d 616, 619 (9th Cir. 1992) (emphasis added). "First, Congress may abrogate the States' constitutionally secured immunity by expressing, in unmistakably clear language, its intention to allow the states to be sued in federal court." *Id. (citing Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242-43, 105 S.Ct. 3142, 87 L.Ed. 2d 171 (1985)).

Eleventh Amendment immunity is not absolute for another reason. "[A] state may waive its Eleventh Amendment immunity and consent to be sued in federal court." *Id.* An Eleventh Amendment waiver by a state must unequivocally evidence the state's intention to subject itself to the jurisdiction of the federal court. *Hill v. Blind Indus. and*

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[2] In fact, Appellants have failed entirely to brief the issue of Eleventh Amendment immunity.

[3] The Eleventh Amendment provides: "The Judicial power of the United States should not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI.

Servs. of Maryland, 179 F.3d 754, 758 (9th Cir. 1999), *as amended,* 201 F.3d 1186 (Jan. 31, 2000).

Indeed, the Supreme Court has explicitly held that the Eleventh Amendment does not automatically destroy original jurisdiction, but is instead a defense to be raised by the State:

> *The Eleventh Amendment, however, does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so.* The State can waive the defense. Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it.

Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381, 389, 118 S.Ct. 2047, 2052-53, 141 L. Ed. 2d 364 (1998) (citations omitted) (emphasis added).

The Ninth Circuit has recently recognized that, in accordance with the Supreme Court's 1998 decision in *Wisconsin Dep't of Corrections,* 524 U.S. 381, Eleventh Amendment immunity is a *"personal privilege which [the state] may waive at [its] pleasure." Hill,* 179 F.3d at 760 *(quoting Clark v. Barnard,* 108 U.S. 436, 447, 2 S.Ct. 878, 27 L.Ed. 780 (1883)) (emphasis added).

In fact, the Ninth Circuit amended *Hill* just six weeks ago to add the following footnote, lest there be any doubt regarding its holding:

> Under the law of this circuit, an entity invoking Eleventh Amendment immunity bears the burden of asserting and proving those matters necessary to establish its defense . . . . As the Court said in *Wisconsin Dep't of Corrections,* "[u]nless the State raises the matter, a court can ignore it." This is true of Eleventh Amendment immunity as a whole, and we believe it to be equally true of any matter needed to establish that immunity's applicability in a given context.

Hill, as amended, 201 F.3d 1186 (Jan. 31, 2000) (citations omitted).

In other words, "the 'personal privilege' articulated in [*Clark,* 108 U.S. 436] most accurately describes Eleventh Amendment immunity," and any waiver of such immunity is to be treated as an affirmative defense. *Hill,* 179 F.3d at 760. That is, Eleventh Amendment immunity "does not implicate a federal court's subject matter jurisdiction in any ordinary sense," and "may even be forfeited by the State's failure to assert it." *Id.* (*quoting ITSI TV Prods., Inc. v. Agricultural Ass'ns*, 3 F.3d 1289, 1291 (9th Cir. 1993)).

As the decision in *Hill* makes clear, Eleventh Amendment immunity is a personal privilege which the state may waive at its pleasure. The state may choose to raise Eleventh Amendment immunity as a defense, or the state may choose *not* to raise the defense. There is no Supreme Court or Ninth Circuit precedent that supports the notion that an opposing party may usurp the state's sovereign authority to invoke the state's immunity defense.

The Eleventh Amendment is not an automatic jurisdictional bar to an ADEA action against a state. As the decision in *Hill* makes clear, the Eleventh Amendment immunity defense is a shield to be invoked by the University should the University choose to use it. It is not a sword to be wielded by Katz in order to avoid an adverse jury verdict.[4]

C. The Eleventh Amendment Immunity Defense Is Waived In This Suit

Prior to *Kimel,* the law of this circuit was that Congress's abrogation of states' immunity in private suits for violations of the ADEA was a valid exercise of congressional power, pursuant to the Fourteenth Amendment. *See Keeton v. University of Nevada Sys.*, 150 F.3d 1055, 1057-58 (9th Cir. 1998), *abrogated by Kimel,* 120 S.Ct. 631. Based upon the law of this circuit prior to the Supreme Court's decision in *Kimel,* the University did not have reason to consider whether to revoke its Eleventh Amendment immunity or whether to waive its Eleventh Amendment immunity and participate in this lawsuit in the federal district court. Now, for purposes of

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[4] The circumstances and procedural history of this case also compel such a conclusion. Katz brought both the federal and state law age discrimination claim in federal court. Katz cannot now, 3½ years later, complain that the forum they chose is inappropriate. Having failed to prevail in the federal forum of their choosing, Katz should not be allowed to use the Eleventh Amendment as a means to belatedly relitigate plaintiffs' claims in state court.

this case only, the University expressly waives its Eleventh Amendment immunity.[5] (*See* Exh. 3, Decl. of James Holst)

"The Regents of the University of California" is a corporation created by the California Constitution to govern the University of California. Cal. Const. art. IX, § 9(a). Article IX, section 9(f) of the California Constitution confers upon the Regents the power to sue and to be sued, as well as the power of administration and delegation: "The regents of the University of California . . . shall also have all the powers necessary or convenient for the effective administration of its trust, *including the power to sue and to be sued . . . and to delegate* to its committees or to the faculty of the university, or *to others, such authority or functions as it may deem wise.*" Cal. Const. art. IX, § 9(f) (emphasis added).

Furthermore, state law clearly recognizes that the Regents is "a constitutionally created arm of the state hav[ing] virtual autonomy in self-governance." *Regents of the Univ. of California v. City of Santa Monica,* 77 Cal. App. 3d 130, 135 (1978); *see San Francisco Labor Council v. Regents of the Univ. of California,* 26 Cal. 3d 785, 788-89 (1980) ("[C]ourts have also recognized the broad powers conferred upon the regents as well as the university's general immunity from legislative regulation . . . . The University is intended to operate as independently of the state as possible."); *Ishimatsu v. Regents of the Univ. of California,* 266 Cal. App. 2d 854,

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[5] *See Doe v. Lawrence Livermore Nat'l Laboratory, et al.*, 131 F.3d 836, 838-39 (9th Cir. 1997) (the Regents of the University of California is an arm of the State of California for purposes of invoking Eleventh Amendment immunity).

864 (1968) (noting that the California Attorney General has held that "[The Regents] is a constitutional corporation or department and constitutes a branch of the state government equal and coordinate with the legislature, the judiciary and the executive . . . . The Regents, not the legislature, have the general rule-making or policy-making power in regard to the University."). In other words, "policies established by the Regents as matters of internal regulation may enjoy a status equivalent to that of state statutes." *City of Santa Monica,* 77 Cal. App. 3d at 135 *(citing Hamilton v. Regents of the Univ. of California,* 293 U.S. 245,257-58, *55* S. Ct. 197, 79 L. Ed. 343 (1934)).

The Board of Regents has the authority, under state law, to either invoke its Eleventh Amendment immunity or to waive its Eleventh Amendment immunity defense. Article IX, § 9(f) also clearly empowers the Regents to delegate its authority through its bylaws. Under Bylaw 21.2, the Board of Regents has delegated to the University's General Counsel the following authority:

> *The General Counsel and Vice President for Legal Affairs, who shall also be an Officer of the University, shall be the chief legal officer of the University; shall have general charge of all legal matters pertaining to the Corporation and the University;* shall attend meetings of the Board and its Committees; *shall represent the Corporation in all legal proceedings;* shall advise the Corporation, its Committees and Officers, the President of the University, University Officers, and Officers of the Academic Senate on legal questions as may be

> required; and shall, subject to the direction of the President of the University, oversee the provision of all legal services to the University.

(Exh. A, Bylaw 21.2, attached to Exh. 3, Decl. of James Holst) (emphasis added).

Thus, pursuant to state law, the Bylaws of the Board of Regents, and the attached declaration of University General Counsel James Holst, the University hereby asserts an express waiver of its Eleventh Amendment immunity with respect to this lawsuit brought by Plaintiffs-Katz in the federal forum. (*See* Exh. 3, Decl. of James Holst)

IV. CONCLUSION

Contrary to Katz's assertions, the Supreme Court in *Kimel* did not divest the federal courts of original subject matter jurisdiction to adjudicate ADEA claims against the states. That is, *Kimel* did not nullify the three years of federal court proceedings in this case.

Furthermore, Eleventh Amendment immunity is not an "automatic" or "absolute" bar to suits against states. It is a personal privilege to be asserted as a defense at the pleasure of the state, and certainly cannot be "invoked" by the attorneys of parties opposing the state. Because Eleventh Amendment immunity has not been asserted and is expressly waived in this case, the Eleventh Amendment does not bar the federal court jurisdiction in this case.

Finally, because Kartz's "lack of original jurisdiction" argument is without merit, Katz's requested remedy in dismissing without prejudice the entire action - including nullifying the jury verdict - is equally meritless.

Based on the foregoing, the University respectfully requests that Katz's motion be denied.

DATED: March 9, 2000

HANSON, BRIDGETT, MARCUS
VLAHOS & RUDY, LLP

By: /s/_____
W. DANIEL CLINTON
PATRICK M. GLENN
Attorneys for Defendant - Appellee

DECLARATION OF JAMES HOLST IN SUPPORT OF APPELLEE'S OPPOSITION TO APPELLANTS' MOTION TO DISMISS APPEAL FOR LACK OF SUBJECT MATTER JURISDICTION

I, James Holst, declare:

1. I am General Counsel for the Regents of the University of California (the "University"). I have personal knowledge of the facts set forth herein and, if called to testify, I could competently testify to them.

2. Under the California Constitution, the Regents "shall . . . have all the powers necessary or convertient for the effective administration of its trust, including the power to sue and to be sued . . . and to delegate to its committees or to the faculty of the university, or to others, such authority or functions as it may deem wise." Cal. Const. art. IX, § 9(f).

3. Attached as Exhibit A is a true and correct copy of Bylaw 21.2 that was duly enacted by the Board of Regents and amended on January 15, 1993, delegating authority to me, as General Counsel, as follows: "The General Counsel and Vice President for Legal Affairs, who shall also be an Officer of the University, shall be the chief legal officer of the University; shall have general charge of all legal matters pertaining to the Corporation and the University . . . shall represent the Corporation in all legal proceedings . . . and shall, subject to the direction of the President of the University, oversee the provision of all legal services to the University."

4. As General Counsel for the University, I am vested with the authority to waive the University's Eleventh Amendment immunity defense, pursuant to Bylaw 21.2, attached as Exhibit A.

5. I expressly waive, on behalf of the University, the University's Eleventh Amendment immunity defense for purposes of this litigation only, namely, *Joseph E. Katz and Roger P. Moore, et al. v. The Regents of the University of California,* No. 99-15384, Appeal from a Judgment of the United States District Court for the Northern District of California, Case No. CV-96-04108 (CRB).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed this 18 day of February 2000 at Oakland, California.

/s/_____
James Holst

BYLAW 21.

DUTIES AND RESPONSIBILITIES OF OFFICERS OF THE CORPORATION

21.1[1] President, Chairman, and Vice Chairman.

The President of the Board shall preside at meetings of the Board, except that the Chairman shall preside in the presence of and at the request of the President of the Board or in the event of the absence or inability to act of the President of the Board.

In case of the absence of the President and Chairman from any meeting of the Board or in case of the inability of the two to act, the Vice Chairman shall perform the duties and acts authorized or required by said President and Chairman to be performed, as long as the inability of these said Officers to act may continue.

In case of the absence of the President, Chairman, and Vice Chairman from any meeting of the Board or in case of the inability of the three to act, the Board shall elect for that meeting a Chairman Pro Tempore and may authorize such Chairman Pro Tempore to perform the duties and acts authorized or required by said President, Chairman, and Vice Chairman to be performed, as long as the inability of these said officers to act may continue.

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[1] As amended 10-17-80 and 11-21-80.

The President, Chairman, and Vice Chairman of the Board, or the Chairman or Vice Chairman of the Committee on Finance is authorized, on behalf of the Corporation, to execute and, unless authority shall be elsewhere conferred by order or resolution of the Board, shall execute, on behalf of the Corporation, all documents necessary to implement programs or policies which have been approved by the Board or by a Committee thereof which has been empowered to act, provided that, unless specifically otherwise directed by the Board, all documents executed by the President, Chairman, and Vice Chairman of the Board or the Chairman or Vice Chairman of the Committee on Finance shall be without force or effect unless also executed or attested to by the Secretary of the Corporation.

Said Officers authorized specifically to execute deeds or other instruments conveying to the Federal Government or appropriate agencies thereof any real property or interests therein which are subject to loans guaranteed by the Federal Government or any agency thereof.

BYLAW 21.

21.2[1] General Counsel.

The General Counsel and Vice President for Legal Affairs, who shall also be an Officer of the

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[1] As amended 1-15-93, effective 3-1-93.

University, shall be the chief legal officer of the University; shall have general charge of all legal matters pertaining to the Corporation and the University; shall attend meetings of the Board and its Committees; shall represent the Corporation in all legal proceedings; shall advise the Corporation, its Committees and Officers, the President of the University, University Officers, and Officers of the Academic Senate on legal questions as may be required; and shall, subject to the direction of the President of the University, oversee the provision of all legal services to the University.

21.3 Secretary.

(a) The Secretary shall give notice of all meetings of the Board and of all meetings of the Committees; shall record and keep the minutes of the proceedings of the Board and of the proceedings of all Committees.

(b) The Secretary shall be the custodian of all official records of the Corporation, including the minutes of all meetings and papers of the Corporation.

(c) The Secretary shall be custodian of the corporate seal of the Corporation and shall affix it to documents executed on behalf of the Corporation and to certifications as required.

(d) The Secretary may certify to any action of the Board or its Committees, to the identity,

appointment, and authority of Officers of the Corporation or of the University, and to the provisions of the Corporation's Bylaws and Standing Orders and to excerpts from the minutes of The Regents.

(e)[2] The Secretary shall execute or attest to all documents which have been executed by the President, Chairman, and Vice Chairman of the Board, or the Chairman or Vice Chairman of the Committee on Finance in accordance with the Corporation's Bylaw 21.1.

(f) The Secretary, acting alone, is authorized, in the name of the Corporation, to enter into and execute the following: . . .

[2] As amended 10-17-80.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed March 28, 2000]

NO. 99-15384

JOSEPH E. KATZ and ROGER P. MOORE, on behalf of themselves and 128 others similarly situated,
Plaintiffs-Appellants,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Defendant-Appellee.

Appeal from a Judgment of the United States District Court for the Northern District of California
Case No. CV 96-04108 (CRB)

Honorable Charles R. Breyer,
United States District Judge

APPELLANTS' REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL FOR LACK OF SUBJECT MATTER JURISDICTION AND TO ORDER DISMISSAL OF THE ENTIRE ACTION WITHOUT PREJUDICE TO REFILING IN STATE COURT

* * * * *

[page 1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In ***Kimel v. Florida Board of Regents***, 528 U.S. __, 120 S.Ct. 631 (2000), the Supreme Court invalidated, on constitutional grounds, the only federal statute that provides a basis for federal court jurisdiction in an ADEA age discrimination case against a state agency. The alleged violation of the ADEA by the University of California ("UC") is the sole basis for federal jurisdiction in this case. No other federal claims are asserted and the only other claims asserted are state law age discrimination claims based on supplemental jurisdiction.

In the wake of ***Kimel***, several federal district courts and at least one circuit court of appeal have summarily dismissed pending ADEA age discrimination cases against state agencies for lack of subject matter jurisdiction.[3] Since its

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[3] ***McGinty v. New York State and Local Employees Retirement System***, 2000 U.S. Dist. LEXIS 2893 (N.D.N.Y. Jan. 19, 2000) ("Claims based on the ADEA may therefore not be raised against States in federal courts. This immunity, which deprives this court of subject matter jurisdiction, is dispositive of the pending

decision in ***Kimel***, the Supreme Court has granted at least four petitions for *writ of certiorari* in cases involving ADEA age discrimination claims against state agencies. The Court then summarily vacated the judgments of the courts of appeals without any discussion on the merits and remanded to the courts of appeals "for further consideration in light of ***Kimel***."[4] Lack of subject matter jurisdiction over the ADEA claims is the only reasonable explanation for the Supreme Court's actions, the remand being for the purpose of determining whether any other federal claims remain. In cases where other employment discrimination claims based on other federal statutes were also being asserted by the plaintiffs (i.e. racial and/or gender discrimination), in response to ***Kimel*** the federal courts have summarily dismissed the ADEA claims while leaving the remaining claims undisturbed. See for example ***Jones v. Washington Metro***, supra. None of those

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action", case dismissed *sua sponte); **Harris v. University of Illinois***, 2000 U.S. Dist. LEXIS 2675 (N.D.Ill. Feb. 28, 2000) (entire ADEA action dismissed for lack of subject matter jurisdiction in light of ***Kimel***); ***Jones v. Washington Metro Transit Authority***, 2000 U.S.App. LEXIS 4109 (D.C.Cir. March 17, 2000) (trial court award of ADEA compensatory and liquidated damages against state agency defendant, following jury verdict, summarily vacated for lack of subject matter jurisdiction based on ***Kimel***. Remaining claims dismissed on other grounds.)

[4] ***PERS v. Arnett***, 120 S.Ct. 930 (Jan. 17, 2000) vacated and remanded to 9th Circuit; ***Board of Trustees, Southern Illinois University v. Wichmann***, 120 S.Ct. 929 (Jan. 18, 2000) vacated and remanded to 7th Circuit; ***Tennessee Board of Regents v. Coger***, 120 S.Ct. 928 (Jan. 18, 2000) vacated and remanded to 6th Circuit; ***University of Connecticut Board of Trustees v. Davis***, 120 S.Ct. 928 (Jan. 18, 2000) vacated and remanded to 2nd Circuit.

cases have even considered the possibility that federal jurisdiction under the ADEA could be resurrected if the public entity defendants elected to waive their sovereign immunity under the 11th Amendment.

In the present case, UC has taken the extraordinary measure of having the University's General Counsel expressly waive UC's statutory immunity under the 11th Amendment in a desperate attempt to resurrect federal jurisdiction and to preserve UC's favorable judgment in the district court. Such drastic action should serve as a bright red flag that something is fundamentally wrong with UC's position. Allowing UC to resurrect federal jurisdiction under the ADEA in the wake of ***Kimel*** by waiving their sovereign immunity would have the effect of allowing state agency defendants in pending ADEA cases nationwide to elect whether or not the federal courts will retain jurisdiction based on whether the state agency defendant likes or dislikes the results of the litigation to date, a result specifically condemned by the primary 9th Circuit case relied on by UC in opposing this motion.

In ***Hill v. Blind Industries of Maryland***, 201 F.3d 1186 (9th Cir. 2000), the 9th Circuit refused to allow state agency defendants to retain the option of asserting the sovereign immunity defense after they have had an opportunity to see "which way the wind is blowing" in the litigation. Thus, although it is true that the 11th Amendment sovereign immunity defense can sometimes be waived by a state statutory enactment consenting to suit in federal court, by failing to raise the defense in litigation, or by an affirmative waiver filed with the court, such a waiver can only occur in cases where the federal court has subject matter

jurisdiction irrespective of whether or not the defendant has asserted its sovereign immunity.

Here, it just so happens that sovereign immunity forms the basis of the Supreme Court's decision to completely invalidate, on constitutional grounds, the only statutory foundation for federal jurisdiction in this case. Since subject matter jurisdiction can never be conferred on a federal court by the consent of one or more of the parties, ***Bender v. Williamsport***, 475 U.S. 534, 541; 106 S.Ct. 1326, 1331 (1986), the University's consent cannot have the effect of conferring continuing jurisdiction on the federal courts in this case in the wake of ***Kimel***.

Any other result would have the intolerable effect of allowing the state agency defendants nationwide to decide, on a case by case basis, whether to resurrect jurisdiction by waiving their sovereign immunity defense in cases where they were pleased with the progress of the litigation before ***Kimel***, and to file motions to dismiss for lack of subject matter jurisdiction in those cases where they would prefer to start over in state court. Thus, the conclusion is simply inescapable that, in the wake of ***Kimel***, pending ADEA age discrimination claims against state agency defendants can no longer continue to be litigated in federal courts, either at the district court level or at the court of appeals level. Instead, all ADEA cases pending in federal courts against state agencies will have to be dismissed for lack of subject matter jurisdiction, but without prejudice to refiling in state court, including this case.

Finally, for UC to argue that the Plaintiffs and Appellants have filed this motion in a "spurious" attempt to simply avoid the unfavorable judgment in the district court

ignores the drastic jurisdictional consequences of the Supreme Court's sweeping ruling in ***Kimel***. UC's position also ignores the reality of the situation which is that, if the jury had found liability and the district court had rendered a $15 million (or $30 million) judgment against UC and UC had appealed, UC undoubtedly would have asserted their sovereign immunity and would have been the party filing this motion. If that had happened, the Plaintiffs would have been powerless to prevent nullification of their favorable verdict and judgment. The same is true of UC.

ARGUMENT

I. *KIMEL* ELIMINATED THE ONLY STATUTORY BASIS FOR FEDERAL JURISDICTION IN AGE DISCRIMINATION CASES BROUGHT UNDER THE ADEA AGAINST STATE AGENCIES SUCH AS UC.

When originally enacted in 1967, the ADEA specifically defined the "employers" who were subject to its age discrimination provisions to exclude "**a State or a political subdivision thereof**". As originally enacted, ***29 USC § 630(b)*** provided in relevant part as follows:

> **(b) "The term "employer" means a person engaged in an industry affecting commerce . . . . The term also means any agent of such a person, but such term does not include the United States, a corporation wholly owned by the Government of the**

> **United States, or a State or political subdivision thereof."**

In 1974, § ***630(b)*** was amended to provide in relevant part as follows:

> **(b) "The term "employer" means a person engaged in an industry affecting commerce . . . . The term also means (1) any agent of such person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, . . . "**

Thus, the only basis for federal jurisdiction over an ADEA claim against a state agency is the specific provision of the ADEA that was enacted in 1974 to extend jurisdiction to state agency defendants. That extension of jurisdiction has now been completely eliminated by the Supreme Court's decision in ***Kimel***, which has the effect of reinstating the version of the statute that existed before the 1974 Amendment. That original version of the statute specifically excluded "a State or political subdivision thereof". Thus, in the wake of ***Kimel***, there is simply no jurisdictional basis for the federal courts to continue to adjudicate ADEA claims against state agency defendants.

II. IN EACH OF THE CASES RELIED ON BY UC, THE 11TH AMENDMENT DID NOT RENDER THE STATUTORY BASIS OF JURISDICTION UNCONSTITUTIONAL AS IT DOES HERE.

In ***Hill v. Blind Industries of Maryland***, supra, relied on by UC, the plaintiff had entered into a contract to sell a substantial portion of his business to the Maryland defendant. When the Maryland defendant failed to pay, ***Hill*** sued in federal court for fraud and breach of contract with jurisdiction based on the diversity of citizenship statute. The Maryland defendant never claimed to be a state agency, and therefore immune from suit under the 11th Amendment, until the day of trial. The 9th Circuit ruled that the 11th Amendment immunity defense had been waived by failing to raise it. However, the 11th Amendment did not render the diversity jurisdiction statute unconstitutional.

In ***Wisconsin Department of Corrections v. Schacht***, 524 U.S. 381; 118 S.Ct. 2047 (1998) relied on by UC, the plaintiff was a prison guard who filed a federal civil rights case against the Department of Corrections in state court. The defendants immediately removed the case to federal court and then asserted their 11th Amendment immunity claims against some but not all of the plaintiff's claims. The district court dismissed the claims subject to the immunity defense on 11th Amendment grounds and dismissed the remaining claims on other grounds. On appeal, the United States Supreme Court simply held that the presence, in an otherwise removable case, of a claim barred by the 11th Amendment does not

destroy removal jurisdiction that would otherwise exist, and that a federal court can dismiss the barred claims and proceed to hear the remaining claims. However, jurisdiction was based on the civil rights statute and the removal jurisdiction statute, which were not rendered unconstitutional by the 11th Amendment.

Finally, in ***Broughton Lumber Co. v. Columbia River Gorge Comm.***, 975 F.2d 616 (9th Cir. 1992) relied on by UC, the plaintiff lumber company sued the commission for violation of the federal Columbia River Gorge National Scenic Area Act with jurisdiction in district court based on general federal question jurisdiction. The district court dismissed the inverse condemnation portion of the action against the states of Oregon and Washington on the grounds that the Gorge Act did not allow suits against states and state agencies and did not abrogate their sovereign immunity. However, the 11th Amendment did not render unconstitutional the basic jurisdictional statutes upon which the action was brought.

In the present case, ***Kimel*** has invalidated the only federal statute upon which federal jurisdiction for ADEA claims against state agencies can be based, and ADEA claims are the only federal claims being asserted against UC.

III. UC DID NOT WAIVE SOVEREIGN IMMUNITY BY FAILING TO ASSERT THE DEFENSE BEFORE *KIMEL* WAS DECIDED AND THEREFORE COULD HAVE ASSERTED THE DEFENSE NOW.

UC relies on ***Hill v. Blind Industries of Maryland***, supra, in support of the proposition that a state agency can waive its sovereign immunity defense by failing to assert it promptly in the litigation. However, UC stops short of arguing that they waived their 11th Amendment immunity defense in this case by failing to raise it before ***Kimel*** was decided. Instead the University argues that:

> **"Based upon the law of this circuit prior to the Supreme Court's decision in *Kimel*, the University did not have reason to consider whether to invoke its Eleventh Amendment immunity or whether to waive its Eleventh Amendment immunity and participate in this lawsuit in the federal district court."** Opp. at page 8.

UC cites the Ninth Circuit's decision in ***Keeton v. University of Nevada***, 150 F.3d 1055, 1057-1058 (9th Cir. 1998) as having established that the 1974 amendment to the ADEA was a valid abrogation of the States' sovereign immumty under the 11th Amendment before ***Kimel***. ***Keeton*** held as follows:

> **Every circuit which has considered the question, save one, has arrived at the same**

> **conclusion [citations omitted] . . . . We join the overwhelming majority of our sister circuits in holding that Congress clearly expressed its intention to abrogate state's immunity in private suits for violation of the ADEA. . . . The district court correctly concluded that Congress abrogated the state's immunity in amending the ADEA pursuant to its Fourteenth Amendment enforcement authority.**

With Congress having specifically amended the ADEA to extend its application to state agencies 26 years ago, and with Supreme Court having upheld the constitutionality of that extension of jurisdiction in 1983 in ***EEOC v. Wyoming***, 460 US 226, 243; 103 S.Ct. 1054 (1983), and with the 9th Circuit's ruling in ***Keeton*** rejecting the 11th Amendment constitutional challenge, there is no possibility that any state agency could be held to have waived their sovereign immunity defense in an ADEA case by not asserting it prior to the Supreme Court's decision in ***Kimel***. See for example the recent opinion in ***Harris v. University of Illinois***, supra, in which the court held as follows:

> **Thus, the University is immune under the 11th Amendment from any claims by Plaintiffs that are grounded in the ADEA. Plaintiffs argue that the University waived its ability to plead as an affirmative defense the Court's lack of subject matter jurisdiction over their claims. Unlike a defense based on a lack of personal jurisdiction, a subject matter jurisdiction**

> **defense may be raised at any stage of the litigation. The Court may also raise the issue *sua sponte*. Moreover, the defense could not validly have been raised sooner, because the state of the law was that Federal Courts possessed subject matter jurisdiction over ADEA claims against state entities. Thus, prior to the issuance of *Kimel* in January of 2000, the University could not plead such an affirmative defense, and is not barred from doing so at this juncture.**
> (Emphasis added).

Therefore, UC did not waive their sovereign immunity by failing to raise it before ***Kimel*** and could have raised it now if they had suffered an adverse judgment in the district court. The fact that they prevailed below is obviously the only reason they are, trying to waive their immunity now in a futile effort to resurrect jurisdiction.

IV. THE PRACTICAL CONSEQUENCES OF DISMISSING THIS CASE WITHOUT PREJUDICE TO REFILING IN STATE COURT ARE NOT MORE ONEROUS THAN RETAINING JURISDICTION.

UC argues that the practical consequences of dismissing this case without prejudice to refiling in state court are significantly more onerous than resurrecting federal jurisdiction based on UC's waiver of sovereign immunity. However, in this particular case, all discovery is complete and

will be fully applicable to the state court proceedings under FEHA. Therefore, once this Court dismisses this case without prejudice, the Plaintiffs can simply file a new complaint in state court under FEHA, U.C. can answer, and the case will immediately be at-issue and ready to be set for trial. That scenario is much less onerous to the parties and to this Court than allowing this appeal and this case to proceed in federal court. If that were to occur, the federal courts could continue to be involved in this case for years to come under circumstances where there is no longer any underlying foundation for the exercise of federal jurisdiction over the only federal claim being asserted against the only defendant in this case.

CONCLUSION

In ***Kimel*** the Supreme Court decided to relegate all age discrimination cases against state agencies to state courts based on state law. To implement this policy, all pending ADEA age discrimination cases that have been brought solely against a state agency defendant(s) in federal court, where federal jurisdiction is based exclusively on the ADEA, must simply be dismissed without prejudice to refiling under state law in state court. For those cases that also involve non-state agency defendants and/or other employment discrimination claims (such as race or gender), the remedy is simply to dismiss the ADEA claims against the state agencies and allow the other clams to continue.

In the wake of ***Kimel***, the federal courts simply no longer have subject matter jurisdiction over ADEA claims against state agencies, and no waver of sovereign immunity by the state agency defendant can change that. Therefore, this

case must be dismissed without prejudice to refiling in state court.

Respectfully submitted,

OLIMPIA, WHELAN & LIVELY

Dated: March 27, 2000 By: /s/_____
GARY L. OLIMPIA

Dated: March 27, 2000 By: /s/_____
DAVID J. RUDE
Attorneys for Plaintiffs
and Appellants

APPENDIX G

29 U.S.C. §§ 203, 216, 623, 626, 630

29 U.S.C. §§ 203(c), (d), (x)
Definitions

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

* * * * *

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or political subdivision of a State; or any interstate governmental agency.

29 U.S.C. § 216(b)
Penalties

(b) Damages; right of action; attorney's fees and costs; termination of right of action. Any employer who violates the provisions of section 6 or section 7 of this Act [29 USCS §§ 206 or 207] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 15(a)(3) of this Act [29 USCS § 215(a)(3)] shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3) [29 USCS § 215(a)(3)], including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 [29 USCS

§ 217] in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act [29 USCS §§ 206 or 207] by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 15(a)(3) [29 USCS § 215(a)(3)].

29 U.S.C. § 623(a)
Prohibition of age discrimination

(a) Employer practices. It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

29 U.S.C. §§ 626(b), (c)
Recordkeeping, investigation, and enforcement

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion. The

provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 USC 211(b), 216, 217) [29 USCS §§ 211(b), 216, 217], and subsection (c) of this section. Any act prohibited under section 4 of this Act [29 USCS § 623] shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 USC 215) [29 USCS § 215]. Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 USC 216, 217) [29 USCS §§ 216, 217]: Provided, That liquidated damages shall be payable only in cases of willful violations of this Act In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary; jury trial.

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act:

Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action.

29 U.S.C. § 630(b), (f), (i)
Definitions

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

* * * * *

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on

such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

* * * * *

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

Supreme Court, U.S.
FILED
APR 12 2001
OFFICE OF THE CLERK

No. 00-1429

IN THE

Supreme Court of the United States

JOSEPH E. KATZ and ROGER P. MOORE,
on behalf of themselves and 128 others similarly situated,

Petitioners,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

W. DANIEL CLINTON
PATRICK M. GLENN*
HANSON, BRIDGETT, MARCUS,
VLAHOS & RUDY, LLP
Attorneys for Respondent
333 Market Street, Suite 2300
San Francisco, CA 94105
(415) 777-3200

* *Counsel of Record*

166393

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Is Eleventh Amendment immunity a privilege akin to an affirmative defense that a State may assert or waive?

2. Did the Supreme Court in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631 (2000), divest federal courts of subject matter jurisdiction over claims brought against States under the Age Discrimination in Employment Act, even if the State expressly consents to suit in the federal forum?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Statement of the Case	1
Reasons for Denying the Writ	5
I. The Ninth Circuit Decision Is In Accord With Well Settled Eleventh Amendment Jurisprudence — Eleventh Amendment Immunity Is A Privilege That May Be Waived By the State.	7
II. The Supreme Court In *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631 (2000), Did Not Divest The Federal Courts Of Original Subject Matter Jurisdiction Over ADEA Claims Brought Against A State, Did Not Render The ADEA Unconstitutional As Applied To States, And Did Not Divest A State Of Its Ability To Consent To Suit In The Federal Forum.	10
III. The Ninth Circuit Decision Does Not Create A Conflict Among The Circuit Courts of Appeal.	14

Contents

Page

IV. The Ninth Circuit's Decision Does Not Represent A Change In Eleventh Amendment Law Nor Does It Present Any Far-Reaching Negative Implications For Eleventh Amendment Jurisprudence In Future Cases. 19

Conclusion 21

Appendix A — Answer To Complaint Filed April 7, 1997 ..... 1a

TABLE OF CITED AUTHORITIES

Page

Cases:

Atascadero State Hosp. v. Scanlon
473 U.S. 234, 105 S. Ct. 3142 (1985) 9

Board of Trustees of the Univ. of Alabama v. Garrett
__ U.S. __, 121 S. Ct. 955 (Feb. 21, 2001) ..11, 12, 13

Butler v. New York State Dep't of Law
211 F.3d 739 (2d Cir. 2000) 14, 15

City of Boerne v. Flores
521 U.S. 507, 117 S. Ct. 2157 (1997) 12

Coger v. Board of Regents of the State of Tenn.
209 F.3d 485 (6th Cir. 2000)
vacating 154 F.3d 296 (6th Cir. 1998) 18

College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.
527 U.S. 666, 119 S. Ct. 2219 (1999) 7, 8, 9, 11

Doe v. Lawrence Livermore Nat'l Laboratory, et al.
131 F.3d 836 (9th Cir. 1997) 4

Erickson v. Board of Governors of State Colleges and Univs.
207 F.3d 945 (7th Cir. 2000) 18

Cited Authorities

Page

Florida Prepaid Postsecondary Educ. Expenses Bd. v. College Savings Bank
527 U.S. 627, 119 S. Ct. 2199 (1999) 11

Fromm v. Commission of Veterans Affairs
220 F.3d 887 (8th Cir. 2000) 17

Hill v. Blind Indus. and Servs. of Md.
179 F.3d 754 (9th Cir. 1999)
as amended, 201 F.3d 1186 (2000) 9, 19, 20

Kazmier v. Widmann
225 F.3d 519 (5th Cir. 2000) 17

Keeton v. University of Nevada Sys.
150 F.3d 1055 (9th Cir. 1998) 3

Kimel v. Florida Bd. of Regents
528 U.S. 62, 120 S. Ct. 631 (2000) ..... *passim*

Lawson v. Shelby County, Tenn.
211 F.3d 331 (6th Cir. 2000) 16

Reese v. State of Michigan
2000 WL 1647923 (6th Cir. 2000)
(unpublished per curiam opinion) 14, 15, 16

Richardson v. New York State Dep't of Correctional Serv.
180 F.3d 426 (2d Cir. 1999) 15

Cited Authorities

Page

Seminole Tribe of Fla. v. Florida
517 U.S. 44, 116 S. Ct. 1114 (1996) 12

Sims v. University of Cincinnati
219 F.3d 559 (6th Cir. 2000) 17

Stanley v. Wisconsin Dep't of Corrections
213 F.3d 340 (7th Cir. 2000) 18

Stevens v. Illinois Dep't of Transportation
210 F.3d 732 (7th Cir. 2000) 18

Walker v. Illinois Dep't of Corrections
213 F.3d 344 (7th Cir. 2000) 17

Wisconsin Dep't of Corrections v. Schacht
524 U.S. 381, 118 S. Ct. 2047 (1998) 8, 9, 13

United States Constitution:

U.S. Const., amend. XI ..... *passim*

U.S. Const., amend. XIV, § 5 ..... 11, 12, 17, 18

Statute:

29 U.S.C. § 621, *et seq.* 2

Rule:

Sixth Circuit Rule 28(g) 15

STATEMENT OF THE CASE

In 1993, Respondent The Regents of the University of California ("Respondent" or "the University") offered a voluntary early retirement incentive program ("VERIP III") to eligible employees of the University of California Retirement Plan ("UCRP"). The eligible employees were those members of the UCRP who were at least 50 years of age and who had at least five (5) years of service in that retirement system. The costs of that incentive program were paid entirely from surplus funds in that retirement plan.

There was a separate retirement system, the Public Employees Retirement System ("PERS"), which covered employees of the University who were employed prior to 1961 when the UCRP came into existence. PERS is a statewide retirement system whose participants include employees of numerous state agencies. It is administered by the State of California.

Employees of the University of California who were members of PERS were not participants in UCRP, did not contribute to UCRP and they were not eligible for the UCRP early retirement plan offered in 1993. Contrary to the assertions made by Petitioners Joseph E. Katz and Roger P. Moore, *et al.* ("Petitioners") that they and other PERS members were "all excluded" from participating in this early retirement plan "solely by reason of their age,"[1] in actual fact, they were never eligible because they were not members of UCRP. Because they were in a separate plan over which the University had no control, an equivalent retirement incentive for PERS members at the University (including

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1. *See* Petition for Writ of Certiorari ("Pet. for Writ"), at 4.

the laboratory employees) would have required the creation of a new retirement plan for PERS members at a cost of at least $40 million.

Petitioners are a class of employees who alleged that the decision of the University to offer an early retirement plan to employees who were members of UCRP, and not to offer a comparable early retirement incentive plan to employees who were members of the separate retirement system PERS, constituted discrimination on the basis of age. On November 14, 1996, Petitioners filed suit against the University in the United States District Court for the Northern District of California, claiming, *inter alia*, violation of the federal Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* (the "ADEA").[2]

The University filed an Answer which included several affirmative defenses. It is undisputed that the University did not, however, plead an affirmative defense based upon Eleventh Amendment immunity. (*See* App. A to Resp't Opp. to Pet. for Writ) Petitioners' age discrimination claims were litigated in the District Court for over two years, culminating in a ten day trial in January and February of 1999. The District Court dismissed Petitioners' disparate impact claims during the initial trial proceedings.[3] Petitioners'

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2. Petitioners' age discrimination claims were brought under both the ADEA and the California Fair Employment and Housing Act. Petitioners pleaded and presented identical factual and legal arguments in support of the age discrimination claims under both statutes.

3. Contrary to Petitioners' representations, the District Court did not "sua sponte" dismiss the disparate impact claims. (*See* Pet. for Writ, at 4-5) The University had moved for summary judgment on the disparate impact claims, which the District Court initially denied, and the issue was fully briefed by the parties.

disparate treatment claims were presented to the jury. The jury returned a verdict in favor of the University. (App. B to Pet. for Writ, at 13a-16a)

Petitioners appealed the judgment, seeking to reverse the District Court's dismissal of the disparate impact claims and challenging various evidentiary rulings. In their opening brief, Petitioners affirmatively stated that the Ninth Circuit had jurisdiction over the subject matter of this appeal. After the briefs of both parties were on file, however, Petitioners filed a motion to dismiss, claiming that the federal courts lack subject matter jurisdiction over the age discrimination claims. (App. D to Pet. for Writ, at 19a-35a) Petitioners requested the Ninth Circuit to vacate the judgment and jury verdict unfavorable to Petitioners, and further requested the Ninth Circuit to "allow" Petitioners to re-litigate anew their claims in state court. Petitioners asserted that the Supreme Court's decision in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631 (2000), compelled such a result. Petitioners' attempt to avoid the adverse findings of the District Court jury trial by claiming that the proceedings below are a nullity is based upon a distorted interpretation of *Kimel*, 528 U.S. 62. This Court's decision in *Kimel* is inapposite to the facts of this case because, in this case, the University expressly waived its Eleventh Amendment immunity and consented to suit in federal court. (*See* App. E to Pet. for Writ, at 36a-54a)

Prior to *Kimel*, the law of the Ninth Circuit was that Congress's abrogation of States' immunity in private suits for violations of the ADEA was a valid exercise of congressional power, pursuant to the Fourteenth Amendment. *See Keeton v. University of Nevada Sys.*, 150 F.3d 1055, 1057-58 (9th Cir. 1998), abrogated by *Kimel*, 528 U.S. 62.

Therefore, based upon the law of the Ninth Circuit prior to *Kimel*, the University did not have reason to consider whether to invoke its Eleventh Amendment immunity or whether to waive its sovereign immunity and participate in this lawsuit in the federal district court. *See Doe v. Lawrence Livermore Nat'l Laboratory, et al.*, 131 F.3d 836, 838-39 (9th Cir. 1997) (the Regents of the University of California is an arm of the State of California for purposes of invoking Eleventh Amendment immunity); Cal. Const. Art. IX, § 9(a) (Article IX, section 9(f) of the California Constitution confers upon the Regents the power to sue and to be sued, as well as the power of administration and delegation). In light of *Kimel*, the Board of Regents pursuant to California state law and the Bylaws of the Board of Regents, delegated to its General Counsel, James Holst, the authority to waive the University's Eleventh Amendment immunity, and to consent to suit in the federal forum. The General Counsel exercised that authority by filing a declaration with the Ninth Circuit. (App. E to Pet. for Writ, at 49a-54a)

On October 25, 2000, the Ninth Circuit issued its opinion. (App. A to Pet. for Writ, at 1a-12a) The Ninth Circuit denied the Petitioners' motion to dismiss. The Ninth Circuit agreed with the University, concluding that

> [n]othing in *Kimel* suggests that the Court intended to remove the statutory jurisdictional basis for age discrimination suits against a state or its agencies. It held that on account of Eleventh Amendment immunity the states can not be compelled to submit to the jurisdiction of the federal courts in such suits.

(App. A to Pet. for Writ, at 5a); *Katz v. The Regents of the University of California*, 229 F.3d 831, 834 (9th Cir. 2000).

The Ninth Circuit further affirmed the District Court's dismissal of Petitioners' disparate impact claims and the jury's verdict in favor of the University. (App. A to Pet. for Writ, at 6a-12a); *Katz*, 229 F.3d at 835-37.

On December 13, 2000, the Ninth Circuit denied Petitioners' request for rehearing and for rehearing en banc. (App. C to Pet. for Writ, at 17a-18a) This Petition for Writ of Certiorari followed.

REASONS FOR DENYING THE WRIT

Petitioners contend that the Ninth Circuit's decision is inconsistent with Eleventh Amendment jurisprudence as well as Supreme Court precedent, claiming that Eleventh Amendment sovereign immunity is not a privilege that may be waived by the State. (Pet. for Writ, at 19-27) Petitioners further contend that the Ninth Circuit erred by rejecting their argument that this Court's decision in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631 (2000), divested the federal courts of original subject matter jurisdiction over claims brought against a State under the ADEA, even if the State has consented to suit. (Pet. for Writ, at 9-19) Finally, Petitioners argue that the Ninth Circuit's decision creates a conflict among the Circuit Courts of Appeal and presents undesirable and far-reaching implications for Eleventh Amendment jurisprudence in the federal courts. (Pet. for Writ, at 6, 18-27)

Petitioners' contentions are without merit, and it is unnecessary for this Court to grant review. First, the Ninth Circuit's decision is in accord with well settled Eleventh Amendment jurisprudence. This Court has held that Eleventh Amendment immunity is a privilege that may be waived by the State. Second, the University submits that contrary to

Petitioners' assertions, this Court in *Kimel*, 528 U.S. 62, did not divest federal courts of original subject matter jurisdiction over ADEA claims brought against a State, did not render the ADEA unconstitutional as applied to States, and did not divest a State of its authority to consent to suit in the federal forum.

The Ninth Circuit's decision in this case does not create a conflict among the Circuit Courts of Appeal. Not only do Petitioners fail to demonstrate that the decisions of any other federal appellate courts conflict with the Ninth Circuit's decision, Petitioners also fail to cite to any case adopting their position that even if a State has consented to suit, private litigants nevertheless may "invoke" or "assert" the State's Eleventh Amendment immunity, on behalf of the State. Likewise, Petitioners cite no case that supports the proposition that *Kimel* eliminated the federal courts' original subject matter jurisdiction over ADEA claims brought against a State, and that the *Kimel* decision rendered the ADEA unconstitutional as applied to the States.

Finally, contrary to Petitioners' assertions, the Ninth Circuit's decision does not represent a change in Eleventh Amendment law nor does it present any far-reaching negative implications for the development of Eleventh Amendment jurisprudence in future cases. For the reasons set forth below, Respondent respectfully requests that the Court deny the Petition for Writ of Certiorari.

I. The Ninth Circuit Decision Is In Accord With Well Settled Eleventh Amendment Jurisprudence — Eleventh Amendment Immunity Is A Privilege That May Be Waived By the State.

Petitioners contend that Eleventh Amendment immunity is not a privilege that may be waived by the State. (Pet. for Writ, at 19-27) However, Eleventh Amendment jurisprudence on this point is well settled. Not long ago, this Court reaffirmed the principle that a State's Eleventh Amendment immunity is a personal privilege which it may waive at its pleasure:

> While this [Eleventh Amendment] immunity from suit is not absolute, we have recognized only two circumstances in which an individual may sue a State. First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment. . . . *Second, a State may waive its sovereign immunity by consenting to suit.*
>
> . . . .
>
> *We have long recognized that a State's sovereign immunity is 'a personal privilege which it may waive at pleasure.'* . . . Generally, we will find a waiver either if the State voluntarily invokes our jurisdiction . . . or else if the State makes a 'clear declaration' that it intends to submit itself to our jurisdiction. . . .

College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670, 675-76, 119 S. Ct.

2219 (1999) (concluding that the State's sovereign immunity was neither validly abrogated by the Trademark Remedy Clarification Act, nor voluntarily waived by the State's activities in interstate commerce) (citations omitted) (emphasis added).

Indeed, in *Schacht*, this Court was explicit in stating that Eleventh Amendment immunity does not automatically destroy original jurisdiction, but instead creates a defense to be raised or waived by the State:

> The Eleventh Amendment, however, does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it.

Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381, 389, 118 S. Ct. 2047, 2052-53 (1998) (citations omitted).

Petitioners' attempt to circumvent *Schacht* is unavailing. (*See* Pet. for Writ, at 26-27) In *Schacht*, the State had removed the case to federal court based on claims arising under federal law, and thereafter filed an Answer which asserted its Eleventh Amendment immunity defense to those claims. This Court held that the State properly removed the case to federal court even though it subsequently asserted an Eleventh Amendment immunity defense to those claims. That is, at the time of removal, the case "fell within the 'original jurisdiction' of the federal courts. The State's later invocation of the Eleventh Amendment placed the particular

claim beyond the power of the federal courts to decide, but it did not destroy removal jurisdiction over the entire case." 524 U.S. at 391 (emphasis in original).

In so deciding, this Court made clear that Eleventh Amendment immunity does not automatically destroy original jurisdiction, but is a defense that the State may choose to assert or waive. *Id.* at 389. Petitioners' assertions to the contrary are without merit.[4]

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4. Petitioners further assert that the Ninth Circuit's reliance upon its previous decision in *Hill v. Blind Indus. and Servs. of Md.*, 179 F.3d 754 (9th Cir. 1999), *as amended*, 201 F.3d 1186 (2000), is "suspect." They argue that under *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S. Ct. 2219 (1999), a State may not impliedly or constructively waive its Eleventh Amendment immunity. (*See* Pet. for Writ, at 17-18) However, *Hill* did not grapple with the theory of implied or constructive waiver. To the contrary, the Ninth Circuit stated that a waiver of Eleventh Amendment immunity must be express and unambiguous, and "must unequivocally evidence the state's intention to subject itself to the jurisdiction of the federal court." 179 F.3d at 758-60 (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241, 105 S. Ct. 3142 (1985)).

Moreover, the present case poses no such conundrum. Whether or not a State can constructively or impliedly waive sovereign immunity under the Eleventh Amendment is not a question raised by the facts of this case. In this case, the University expressly waived its sovereign immunity and consented to suit in the federal forum. Nowhere in the Ninth Circuit's opinion are questions of implied or constructive waiver discussed. (*See* App. A to Pet. for Writ, at 5a-6a); *Katz v. The Regents of the University of California*, 229 F.3d 831, 834-35 (9th Cir. 2000). Accordingly, review should not be granted based on those illusory issues.

II. The Supreme Court In *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631 (2000), Did Not Divest The Federal Courts Of Original Subject Matter Jurisdiction Over ADEA Claims Brought Against A State, Did Not Render The ADEA Unconstitutional As Applied To States, And Did Not Divest A State Of Its Ability To Consent To Suit In The Federal Forum.

Petitioners contend that the Ninth Circuit's decision runs afoul of this Court's decision in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631 (2000), arguing that *Kimel* mandates dismissal of their lawsuit in the federal forum — the forum in which Petitioners themselves chose to bring suit — so that they may re-litigate their claims in state court.

Petitioners contend that the Supreme Court's decision in *Kimel*, 528 U.S. 62, eliminated on constitutional grounds the basis for original subject matter jurisdiction of this action in federal courts under the ADEA and also eliminated any supplemental jurisdiction the District Court may have had over the Petitioners' state law age discrimination claims under California's Fair Employment and Housing Act. Petitioners read *Kimel* to require a determination that all federal court proceedings heretofore conducted in this case are void as having been conducted without any original or supplemental subject matter jurisdiction. (Pet. for Writ, at 12) Petitioners further assert that the ADEA is invalid and unconstitutional in the context of litigation brought by individuals against the States. (Pet. for Writ, at 12-13)

Petitioners misapprehend and distort the holding of *Kimel*, 528 U.S. 62. Contrary to Petitioners' assertions, *Kimel*

does not divest the federal courts of original subject matter jurisdiction over ADEA claims brought against a State. Rather, in *Kimel*, the States by way of an affirmative defense, invoked their sovereign immunity, arguing that the ADEA claims brought against them were barred by their Eleventh Amendment immunity. This Court ultimately dismissed the suits against the States, holding that Congress, by amending the ADEA to make its provisions applicable to the States, exceeded its authority under Section 5 of the Fourteenth Amendment to abrogate the States' Eleventh Amendment immunity.[5] 528 U.S. at 91-92.

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5. Petitioners repeatedly assert that in *Kimel*, this Court concluded that the 1974 Amendments to the ADEA were "unconstitutional under the Eleventh Amendment." (*See, e.g.*, Pet. for Writ, at 7, 13, 16) Rather, this Court held that Congress exceeded its authority under section 5 of the Fourteenth Amendment by purportedly abrogating the States' sovereign immunity to suits by private individuals under the ADEA. 528 U.S. at 91. Petitioners similarly mischaracterize several other decisions by asserting that certain statutes were found by this Court to "violate[] the Eleventh Amendment" or be "barred by the Eleventh Amendment." (Pet. for Writ at 7-8); *see Board of Trustees of the Univ. of Alabama v. Garrett*, __ U.S. __, 121 S. Ct. 955 (Feb. 21, 2001) (Congress did not validly abrogate the States' Eleventh Amendment immunity from suits for money damages under Title I of the Americans with Disabilities Act); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S. Ct. 2219 (1999) (concluding that the State's sovereign immunity was neither validly abrogated by the Trademark Remedy Clarification Act, nor voluntarily waived by the State's activities in interstate commerce); *Florida Prepaid Postsecondary Educ. Expenses Bd. v. College Savings Bank*, 527 U.S. 627, 119 S. Ct. 2199 (1999) (Congress's purported abrogation of States' sovereign immunity under the Patent Remedy Act was invalid under section 5 of the Fourteenth

(Cont'd)

This Court's focus in *Kimel* was upon the language used by Congress in the ADEA to abrogate the States' immunity under the Eleventh Amendment. The *ratio decidendi* of this Court's decision was that the ADEA's purported abrogation of the States' sovereign immunity was invalid, leaving the Eleventh Amendment immunity available to States in ADEA cases. As this Court stated, "We hold only that, in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits by private individuals." *Id.* at 91. *Kimel* did not render the ADEA unconstitutional. *See id.* at 78, 91-92. The ADEA remains valid legislation, even as applied to the States.

In fact, following the decision in *Kimel*, this Court recently held that Congress did not validly abrogate the States' Eleventh Amendment immunity from suits for money damages under Title I of the Americans with Disabilities Act ("ADA"). *Board of Trustees of the Univ. of Alabama v. Garrett*, __ U.S. __, 121 S. Ct. 955 (Feb. 21, 2001). In concluding that Congress's purported abrogation of the States' Eleventh Amendment immunity was invalid, this Court was careful to explain that the ADA itself remained valid legislation, applicable to the States:

> Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit

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(Cont'd)

Amendment); *see also City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997) (Congress exceeded its authority under section 5 of the Fourteenth Amendment in enacting the Religious Freedom Restoration Act of 1993); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55-73, 116 S. Ct. 1114 (1996) (Indian Commerce Clause did not grant Congress the power to abrogate the States' sovereign immunity).

> by private individuals for money damages under Title I *does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States.* Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 l. Ed. 714 (1908). . . .

Id. at 968 n.9 (emphasis added).

The same reasoning holds true here. This Court's decision in *Kimel* did not render the ADEA constitutionally infirm, did not divest federal courts of original subject matter jurisdiction over ADEA claims brought by parties against the States, and it did not render the States unable to consent to suit in the federal forum. *Kimel* does not mandate dismissal of Petitioners' lawsuit "without prejudice," and does not compel nullification of the federal jury verdict after more than four years of proceedings in the federal courts.

As the Ninth Circuit properly concluded, this Court in *Kimel* simply held that Congress failed to effectively abrogate the States' Eleventh Amendment immunity. Nothing in *Kimel* indicates that this Court was seeking to depart from *Schacht* or divest a State of its ability to consent to suit in the federal forum. As such, sovereign immunity remains a defense available to States in private ADEA lawsuits commenced in the federal courts.

III. The Ninth Circuit Decision Does Not Create A Conflict Among The Circuit Courts of Appeal.

Petitioners assert that the Ninth Circuit decision creates a conflict among the Circuit Courts of Appeal. This simply is not so. Indeed, Petitioners have not cited to a single case — from the other Circuit Courts of Appeal — which supports its tortured interpretation of *Kimel* as having divested the federal courts of original subject matter jurisdiction over ADEA claims brought against the States or as having rendered the ADEA unconstitutional as applied to States. There is no supporting authority for this assertion.

In an attempt to demonstrate a division among the Circuit Courts of Appeal purportedly germane to the present case, Petitioners argue that the Second Circuit and the Sixth Circuit have rendered decisions indicating that they *sua sponte* dismissed ADEA claims raised against the State based on the State's sovereign immunity. (Pet. for Writ, at 21-22) But neither of the two cases cited by Petitioners involves a situation in which a State expressly waived its sovereign immunity and consented to suit in federal court. *See Butler v. New York State Dep't of Law*, 211 F.3d 739, 745-46 (2d Cir. 2000) (dismissing on appeal plaintiff's ADEA claim under *Kimel*, where plaintiff had appealed district court's grant of summary judgment in favor of the State); *Reese v. State of Michigan*, 2000 WL 1647923 (6th Cir. 2000) (unpublished per curiam opinion) (finding that the State had not expressly waived its Eleventh Amendment immunity and dismissing plaintiff's ADA claims on that basis).

It is unclear from the text of the *Butler* opinion whether or not the Second Circuit raised the Eleventh Amendment issue *sua sponte*. *See Butler*, 211 F.3d at 745-46. The opinion

does not recount the procedural history of the case in sufficient detail to determine whether or not the State had previously asserted its immunity. But in any event, there is no indication that the State in *Butler* consented to suit in the federal forum. *Butler* therefore, does not conflict with the Ninth Circuit's decision.[6]

Petitioners next cite a Sixth Circuit decision, *Reese v. State of Michigan*, 2000 WL 1647923 (6th Cir. 2000) (unpublished per curiam opinion). While the Sixth Circuit in *Reese* did raise the issue *sua sponte*, this decision is an unpublished decision, and therefore under the Sixth Circuit's rules should not be cited and has no precedential value. (*See* Sixth Circuit Rule 28(g)) Moreover, it is clear from the Sixth Circuit's opinion that the State had not consented to suit. Indeed, the Sixth Circuit seemed to acknowledge the State's authority to waive its Eleventh Amendment immunity and consent to suit in federal court by stating,

> [A] private litigant may proceed with federal litigation against a state or its agencies if the state has waived its Eleventh Amendment immunity and consented to suit in federal court. . . . Because

6. Moreover, despite Petitioners' suggestions to the contrary, the Second Circuit recognizes that "a state may be divested of immunity and haled into federal court" by waiving its immunity and agreeing to be sued in federal court. *Richardson v. New York State Dep't of Correctional Serv.*, 180 F.3d 426, 448 (2d Cir. 1999) (holding that the State did not waive its Eleventh Amendment immunity by failing to raise the defense until it moved for summary judgment). In fact, the Second Circuit has stated explicitly that "[a]s an initial matter, unlike a true jurisdictional bar, the [Eleventh Amendment] defense may be waived. Additionally, the Supreme Court has suggested that it is not obligated to raise the issue on its own motion." *Id.* (citations omitted).

> the State of Michigan has not issued a "clear declaration' expressly consenting to suit in federal court, and because neither [the state agency] nor the state voluntarily invoked federal jurisdiction in this case, the defendants have not waived their Eleventh Amendment immunity.

2000 WL 1647923, at **3 (citations omitted). Thus, *Reese* does not conflict with the Ninth Circuit's decision in the present case.[7]

Petitioners misconstrue the Ninth Circuit's opinion. The Ninth Circuit did not conclude that a court was unable to *sua sponte* consider or raise the issue of Eleventh Amendment immunity; nor did the Ninth Circuit conclude that sovereign immunity is an issue that it "ought to ignore unless raised." (Pet. for Writ, at 22) To the contrary, the Ninth Circuit explained that Eleventh Amendment immunity is a defense that may be asserted or waived by the State, and that the defense need not be raised by the Court. (App. A to Pet. for Writ, at 5a-6a); *Katz*, 229 F.3d at 834. There was no need for the Ninth Circuit to "sua sponte" raise the issue of Eleventh Amendment immunity in the present case, because the University had waived its sovereign immunity, expressly consenting to suit in the federal forum.

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7. Again, despite Petitioners' suggestions to the contrary, the Sixth Circuit recognizes that "a state may waive the protection of the [Eleventh Amendment] by consenting to suit. . . . A state may expressly waive immunity from suit for money damages in court. Consent may also take the form of a voluntary appearance and defense on the merits in federal court. . . ." *Lawson v. Shelby County, Tenn.*, 211 F.3d 331, 334 (6th Cir. 2000) (citations omitted).

In another attempt to thread together cases showing division among the Circuit Courts of Appeal on an issue purportedly germane to the present case, Petitioners argue that "once sovereign immunity has been raised," certain Circuit Courts of Appeal have indicated that "subject matter jurisdiction" is implicated. (Pet. for Writ at 23-24) Even if Petitioners' assertion were true, it is of no consequence to the disposition of this case. In this case, the University did not assert its sovereign immunity; rather, it expressly waived the defense and consented to suit. Thus, this case fails to pose the issue that Petitioners request this Court to review.

The Ninth Circuit decision is not inconsistent with the cases cited by Petitioners. None of the cases cited involved a situation in which the State consented to suit. In fact, the opinions of most, if not all of the cases cited, make clear that the State had affirmatively asserted its Eleventh Amendment immunity.[8] None of those cases involved a

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8. *See Kazmier v. Widmann*, 225 F.3d 519, 523-33 (5th Cir. 2000) (holding that Congress did not abrogate States' Eleventh Amendment immunity under the Family and Medical Leave Act ("FMLA"), and dismissing such claims where the State had moved to dismiss the claims on grounds of sovereign immunity); *Fromm v. Commission of Veterans Affairs*, 220 F.3d 887 (8th Cir. 2000) (holding that Congress did not effectively abrogate States' sovereign immunity under the ADEA, and affirming summary judgment for the State where the State had asserted Eleventh Amendment immunity); *Sims v. University of Cincinnati*, 219 F.3d 559 (6th Cir. 2000) (affirming dismissal of FMLA claims against the State, holding that Congress did not validly abrogate the State's Eleventh Amendment immunity); *Walker v. Illinois Dep't of Corrections*, 213 F.3d 344 (7th Cir. 2000) (concluding that because Congress exceeded its authority under section 5 of the Fourteenth Amendment, plaintiff's ADA claim must be dismissed where the State asserted its Eleventh (Cont'd)

situation where a private litigant — in the guise of raising a "jurisdictional" issue — attempted to avoid an adverse jury verdict by "asserting" the State's Eleventh Amendment immunity on the State's behalf.

(Cont'd)
Amendment immunity); *Stanley v. Wisconsin Dep't of Corrections*, 213 F.3d 340 (7th Cir. 2000) (concluding that because Congress exceeded its authority under section 5 of the Fourteenth Amendment, plaintiff's ADA claims were barred by the State's Eleventh Amendment immunity); *Stevens v. Illinois Dep't of Transportation*, 210 F.3d 732, 736 (7th Cir. 2000) (in holding that Congress did not validly abrogate the States' Eleventh Amendment immunity under the ADA and dismissing such claims where the State moved to vacate on grounds of Eleventh Amendment immunity, the Seventh Circuit stated that "[t]he Eleventh Amendment renders a State immune from any suit brought by an individual in federal court *unless the State has consented to being sued in that forum*.") (emphasis added); *Coger v. Board of Regents of the State of Tenn.*, 209 F.3d 485 (6th Cir. 2000) (holding that Congress did not validly abrogate States' sovereign immunity under the ADEA, and affirming dismissal of ADEA claims where the State had moved to dismiss on grounds of Eleventh Amendment immunity), *vacating* 154 F.3d 296, 299-300 (6th Cir. 1998); *Erickson v. Board of Governors of State Colleges and Univs.*, 207 F.3d 945 (7th Cir. 2000) (holding that Congress had not effectively abrogated the States' Eleventh Amendment immunity under the ADA, and dismissing such claims where the State moved to dismiss on grounds of Eleventh Amendment immunity, but further clarifying that the ADA remains valid legislation as applied to States).

IV. The Ninth Circuit's Decision Does Not Represent A Change In Eleventh Amendment Law Nor Does It Present Any Far-Reaching Negative Implications For Eleventh Amendment Jurisprudence In Future Cases.

Finally, Petitioners proclaim a fear of far-reaching implications from the Ninth Circuit's decision. In what can only be characterized as duplicitous, Petitioners argue that based on the Ninth Circuit's decision, "a state is free to litigate ADEA claims against it in federal court and then assert its sovereign immunity in the event of an unfavorable result." (Pet. for Writ, at 6)[9]

Notably, Petitioners' fears and concerns are addressed by the Ninth Circuit's decision in *Hill v. Blind Indus. and Servs. of Md.*, 179 F.3d 754 (9th Cir. 1999), *as amended*, 201 F.3d 1186 (2000) — the very decision they decry. (Pet. for Writ, at 17-18) *Hill* clearly demonstrates that under Ninth Circuit law, a State may not actively participate in the lawsuit and test the winds of litigation before asserting Eleventh Amendment immunity.[10] *See Hill*, 179 F.3d at 763.

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9. Petitioners commenced this case in federal court, prosecuted their age discrimination claims in the federal court system for four years, obtained adverse court and jury determinations and now seek to negate the entire process by asserting that the federal courts lack subject matter jurisdiction to hear the case because of their "invocation" of the State of California's sovereign immunity.

10. *Hill* presented the situation where the State apparently sought to hold onto its immunity card until the day before trial. The Ninth Circuit concluded that in such a situation, the State had "unequivocally consented to the jurisdiction of the federal court by

(Cont'd)

Such actions on the part of a State defendant will be deemed to constitute an express waiver of its sovereign immunity, thereby precluding the implications feared by Petitioners. The Ninth Circuit decision in the present case embraces *Hill*, and does not dictate a different outcome.

Furthermore, a State's sovereign immunity should not be made subject to the will and whimsy of private litigants seeking a tactical advantage in litigation against the State. The Eleventh Amendment immunity is a shield to be invoked by the University should the University choose to assert it. It is not a sword to be wielded by Petitioners in order to avoid an adverse jury verdict.

As this Court's Eleventh Amendment decisions make clear, Eleventh Amendment immunity is a privilege which the State may assert or may waive at its pleasure. That is, the University may raise Eleventh Amendment immunity as a defense, or the University may choose not to raise the defense. There is no authority that supports the notion that private litigants such as Petitioners may usurp the State's sovereign authority by "invoking" the State's Eleventh Amendment immunity.

(Cont'd)
its conduct in appearing and actively litigating th[e] case on the merits, while waiting until the opening day of trial to first assert immunity under the Eleventh Amendment." *Hill v. Blind Indus. and Servs. of Md.*, 179 F.3d 754, 763 (9th Cir. 1999), as amended, 201 F.3d 1186 (2000). The State was deemed to have waived its sovereign immunity, as "[t]he Eleventh Amendment was never intended to allow a state to appear in federal court and actively litigate the case on the merits, and only later belatedly assert its immunity from suit in order to avoid an adverse result." *Id.*

CONCLUSION

Wherefore, the Respondent respectfully requests the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

W. DANIEL CLINTON
PATRICK M. GLENN*
HANSON, BRIDGETT, MARCUS,
VLAHOS & RUDY, LLP
Attorneys for Respondent
333 Market Street, Suite 2300
San Francisco, CA 94105
(415) 777-3200

* *Counsel of Record*

APPENDIX

APPENDIX A — ANSWER TO COMPLAINT FILED APRIL 7, 1997

FRED W. ALVAREZ, State Bar # 68115
MILLICENT S. MERONEY, State Bar # 151304
MICHAEL J. LEVY, State Bar # 172278
WILSON, SONSINI, GOODRICH & ROSATI
Professional Corporation
650 Page Mill Road
Palo Alto, California 94304-1050
Telephone: (415) 493-9300

Attorneys for Defendant
THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CASE NO.: C96-04108 MMC ARB

JOSEPH E. KATZ, ROGER P. MOORE, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Defendants.

ANSWER TO COMPLAINT

Appendix A

Pursuant to Federal Rule of Civil Procedure 8(b), Defendant The Regents of the University of California ("the Regents" or "Defendant") hereby answers the Complaint of plaintiffs Joseph E. Katz, Roger P. Moore, and others similarly situated, which Complaint alleges, *inter alia*, causes of action for: (1) a disparate impact claim of age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (the "ADEA"); (2) a disparate impact claim of age discrimination in violation of the California Fair Employment and Housing Act, Cal. Govt. Code § 12941 ("FEHA"); (3) a disparate treatment claim of age discrimination in violation of the ADEA; (4) a disparate treatment claim of age discrimination in violation of the FEHA; and (5) breach of the implied covenant of good faith and fair dealing, as follows:

1. Answering Paragraph 1 of the Complaint, the Regents deny that "Unlawful employment practices on the basis of age" have occurred and deny that there is any "appropriate relief" required. Except as expressly denied, the Regents admit the allegations in said Paragraph.

2. Answering Paragraph 2 of the Complaint, the Regents admit that, based on information provided to defendant by plaintiff Joseph E. Katz, he is over the age of 40. The Regents deny the remaining allegations in said Paragraph.

3. Answering Paragraph 3 of the Complaint, the Regents admit that, based on information provided to defendant by plaintiff Roger P. Moore, he is over the age of 40. The Regents deny the remaining allegations in said Paragraph.

4. Answering Paragraph 4 of the Complaint, the Regents note that its principal place of business is in Oakland, California, and otherwise admits the allegations in said Paragraph.

5. Answering Paragraph 5 of the Complaint, the Regents admit that the Lawrence Livermore National Laboratory is operated and maintained by the Regents under contract with the Department of Energy. The Regents deny each and every remaining allegation in said Paragraph.

6. Answering Paragraph 6 of the Complaint, the Regents admit that the Ernest Orlando Lawrence Berkeley National Laboratory is operated and maintained by the Regents under contract with the Department of Energy. The Regents deny each and every remaining allegation in said Paragraph.

7. Answering Paragraph 7 of the Complaint, the Regents deny each and every allegation in said Paragraph in that it presumes that there is more than one proper defendant to this action. The only arguably proper defendant to this action is the Regents. The Regents advanced such argument in its Motion to Dismiss, which plaintiffs did not oppose in their brief in Opposition to Defendant's Motion to Dismiss.

8. Answering Paragraph 8 of the Complaint, the Regents admit the allegations in said Paragraph.

9. Answering Paragraph 9 of the Complaint, the Regents admit that venue of this action belongs in the Northern District of California. The Regents deny each and every remaining allegation contained in said Paragraph.

10. Answering Paragraph 10 of the Complaint, the Regents admit the allegations in said Paragraph.

11. Answering Paragraph 11 of the Complaint, the Regents are without sufficient knowledge or information to form a belief

as to the truth of the allegation that the class is limited to PERS members who were also members of an unincorporated association known as "APLE-LAG" who would have accepted the VERIP early retirement incentive had it been offered to them. The Regents are without sufficient knowledge or information to form a belief as to the truth of the allegation that the class members will obtain the consent of this Court to join this action pursuant to the Fair Labor Standards Act, 29 U.S.C. § 216(b), as incorporated into the ADEA. The Regents deny each and every remaining allegation contained in said Paragraph.

12. Answering Paragraph 12 of the Complaint, the Regents deny each and every allegation contained in said Paragraph.

13. Answering Paragraph 13 of the Complaint, the Regents deny each and every allegation contained in said Paragraph.

14. Answering Paragraph 14 of the Complaint, the Regents deny each and every allegation contained in said Paragraph.

15. Answering Paragraph 15 of the Complaint, the Regents deny each and every allegation contained in said Paragraph.

16. Answering Paragraph 16 of the Complaint, the Regents admit that on or about May-June of 1993, eligible employees of the University of California at the Lawrence Livermore National Laboratory and Lawrence Berkeley Laboratory who were participants in the University of California Retirement System were offered a voluntary retirement incentive of three years of service credit, three years of age credit and three months extra pay. The Regents admit that such retirement incentive was called "VERIP III". The Regents further admit that PERS employees were not offered VERIP III. The Regents deny each and every remaining allegation contained in said Paragraph.

Appendix A

17. Answering Paragraph 17 of the Complaint, the Regents deny each and every allegation in said Paragraph.

18. Answering Paragraph 18 of the Complaint, the Regents deny each and every allegation in said Paragraph.

19. Answering Paragraph 19 of the Complaint, the Regents deny each and every allegation contained in said Paragraph.

20. Answering Paragraph 20 of the Complaint, the Regents are without sufficient knowledge or information to form a belief as to the truth of the allegations in said Paragraph.

21. Answering Paragraph 21 of the Complaint, the Regents deny that plaintiffs timely exhausted their federal and/or state administrative remedies. The Regents admit that a right to sue letter to plaintiffs by the Department of Fair Employment and Housing is dated January 10, 1995. The Regents admit that right to sue letters to plaintiffs by the EEOC are dated October 11, 1996 and have been attached to the complaint as exhibits. The Regents deny each and every remaining allegation contained in said Paragraph.

22. Answering Paragraph 22 of the Complaint, the Regents deny each and every allegation contained in said Paragraph.

23. Answering Paragraph 23 of the Complaint, the Regents hereby incorporate by reference as if fully set forth herein its answer to Paragraphs 1-22, inclusive, of the Complaint.

24. Answering Paragraph 24 of the Complaint, the Regents deny each and every allegation as contained in said Paragraph.

Appendix A

25. Answering Paragraph 25 of the Complaint, the Regents deny each and every allegation as contained in said Paragraph.

26. Answering Paragraph 26 of the Complaint, the Regents hereby incorporate by reference as if fully set forth herein its answer to Paragraphs 1-25, inclusive, of the Complaint.

27. Answering Paragraph 27 of the Complaint, the Regents deny each and every allegation in said Paragraph.

28. Answering Paragraph 28 of the Complaint, the Regents deny each and every allegation in said Paragraph.

29. Answering Paragraph 29 of the Complaint, the Regents deny each and every allegation in said Paragraph.

30. Answering Paragraph 30 of the Complaint, the Regents hereby incorporate by reference as if fully set forth herein its answer to Paragraphs 1-29, inclusive, of the Complaint.

31. Answering Paragraph 31 of the Complaint, the Regents deny each and every allegation in said Paragraph.

32. Answering Paragraph 32 of the Complaint, the Regents deny each and every allegation in said Paragraph.

33. Answering Paragraph 33 of the Complaint, the Regents deny each and every allegation in said Paragraph.

34. Answering Paragraph 34 of the Complaint, the Regents hereby incorporate by reference as if fully set forth herein its answer to Paragraphs 1-33, inclusive, of the Complaint.

35. Answering Paragraph 35 of the Complaint, the Regents deny each and every allegation in said Paragraph.

36. Answering Paragraph 36 of the Complaint, the Regents deny each and every allegation in said Paragraph.

37. Answering Paragraph 37 of the Complaint, the Regents deny each and every allegation contained in said Paragraph.

38. Answering Paragraph 38 of the Complaint, the Regents deny each and every allegation contained in said Paragraph.

39. Answering Paragraph 39 of the Complaint, the Regents deny each and every allegation contained in said Paragraph.

Appendix A

AFFIRMATIVE DEFENSES

As and for its Affirmative Defenses to the Complaint, Defendant avers upon information and belief as follows:

FIRST SEPARATE AND AFFIRMATIVE DEFENSE
(Exhaustion of Administrative Remedies)

Plaintiffs' claims are barred, in whole or in part, by the failure to exhaust their administrative remedies in a timely fashion as required under the ADEA, 29 U.S.C. § 626(d), and/or the FEHA, Cal. Govt. Code § 12941.

SECOND SEPARATE AND AFFIRMATIVE DEFENSE
(Legitimate Business Interests)

Plaintiffs' claims for disparate impact are barred because to the extent plaintiffs were not offered an early retirement incentive, this decision is not actionable as it was done to serve the Regents' legitimate business interests.

THIRD SEPARATE AND AFFIRMATIVE DEFENSE
(Legitimate Nondiscriminatory reason)

Plaintiffs' claims for disparate treatment are barred because to the extent plaintiffs were treated differently, such treatment was not based on their age or other protected basis. Instead, any such action was taken for legitimate nondiscriminatory reasons.

Appendix A

FOURTH SEPARATE AND AFFIRMATIVE DEFENSE
(Reasonable Factors Other than Age)

Plaintiffs' claims for age discrimination under the ADEA are barred because the Regents' decision not to offer a VERIP-III like incentive to PERS members was a decision based on reasonable factors other than age pursuant to 29 U.S.C. § 623(f)(1).

FIFTH SEPARATE AND AFFIRMATIVE DEFENSE
(Observance of the Terms of a Bona Fide Employee Benefit Plan)

Plaintiffs' claims for age discrimination under the ADEA are barred because any action by the Regents was done to observe a bona fide employee benefit plan that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of the Act, pursuant to 29 U.S.C. § 623(f)(2)(B)(ii).

SIXTH SEPARATE AND AFFIRMATIVE DEFENSE
(Statute of Limitations)

Plaintiffs' claims are barred, in whole or in part, by the applicable statutes of limitations.

SEVENTH SEPARATE AND AFFIRMATIVE DEFENSE
(Estoppel, Waiver and Forfeiture)

Plaintiffs' claims are barred, in whole or in part, by the doctrines of estoppel, waiver and forfeiture by reason of Plaintiffs' conduct, actions and communications to the Regents and/or its agents or employees.

Appendix A

EIGHTH SEPARATE AND AFFIRMATIVE DEFENSE
(Laches)

Plaintiffs' claims are barred, in whole or in part, by the doctrine of laches.

NINTH SEPARATE AND AFFIRMATIVE DEFENSE
(Unclean Hands)

Plaintiffs' claims are barred, in whole or in part, by the doctrine of unclean hands.

TENTH SEPARATE AND AFFIRMATIVE DEFENSE
(Lack of Damages)

The Regents allege that plaintiffs have not been damaged in any amount, manner, or at all by reason of any act alleged against defendant in the Complaint and therefore the relief prayed for in the Complaint cannot be granted.

ELEVENTH SEPARATE AND AFFIRMATIVE DEFENSE
(No Entitlement to Attorneys Fees)

The Regents allege that neither the Complaint nor the causes of action purportedly stated therein states facts sufficient to constitute a claim for attorneys' fees.

TWELFTH SEPARATE AND AFFIRMATIVE DEFENSE
(No Entitlement to Punitive or Exemplary Damages)

The Regents allege that neither the Complaint nor the causes of action purportedly stated therein states facts sufficient to constitute a claim for punitive damages against defendant.

Appendix A

THIRTEENTH SEPARATE AND
AFFIRMATIVE DEFENSE
(Failure to State a Claim)

The Complaint, and each and every count alleged therein, fails to state a claim upon which relief can be granted.

FOURTEENTH SEPARATE AND
AFFIRMATIVE DEFENSE
(Not a Proper Class Action)

This action is not a proper or appropriate class action.

FIFTEENTH SEPARATE AND
AFFIRMATIVE DEFENSE
(Not Adequate Class Representatives)

Plaintiffs are not adequate class representatives of the purported class they seek to represent.

SIXTEENTH SEPARATE AND
AFFIRMATIVE DEFENSE
(Failure to Mitigate Damages)

Plaintiffs have neglected and failed to mitigate their alleged damages.

Appendix A

SEVENTEENTH SEPARATE AND
AFFIRMATIVE DEFENSE
(Manager's Discretion)

The Regent's conduct was at all times within the proper and lawful exercise of its management discretion.

EIGHTEENTH SEPARATE AND
AFFIRMATIVE DEFENSE
(No Entitlement to Punitive or Exemplary Damages)

The Regents allege that plaintiffs cannot claim exemplary or punitive damages against defendant pursuant to California Government Code Section 818 (which provides, in pertinent part, that a public entity is not liable for such damages) and California Government Code Section 811.2 (which provides, in pertinent part, that the Regents of the University of California is a "public entity").

NINETEENTH SEPARATE AND
AFFIRMATIVE DEFENSE
(No Entitlement to Punitive or Exemplary Damages)

Plaintiffs cannot allege exemplary or punitive damages pursuant to 42 U.S.C. Section 1981a.

TWENTIETH SEPARATE AND
AFFIRMATIVE DEFENSE
(No Disparate Impact Theory)

Plaintiffs cannot rely on disparate impact theory to prove discrimination on the facts alleged.

Appendix A

WHEREFORE, defendant the Regents of the University of California prays for judgment as follows:

1. That plaintiffs take nothing by reason of their Complaint, and that judgment be rendered in favor of the Regents;

2. That defendant be awarded its costs of suit and attorneys fees incurred in defense of this action; and

3. For such other and further relief as the Court deems just and proper.

Dated: April 7, 1997

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By s/ Millicent S. Meroney
Millicent S. Meroney

Attorneys for Defendant
The Regents of the University of California

Supreme Court, U.S.
FILED
APR 23 2001
CLERK

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No. 00-1429

In the Supreme Court of the United States

JOSEPH E. KATZ and ROGER P. MOORE,
on behalf of themselves and 128 others similarly situated,
Petitioners,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

GARY L. OLIMPIA
Counsel of Record
OLIMPIA, WHELAN & LIVELY
2502 STEVENS CREEK BLVD.
SAN JOSE, CA 95128-9973
(408) 971-7252

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

Reply to Respondent's Statement of the Case . . . 2

ARGUMENT 2

Kimel Held That Congress' Extension of the ADEA to the States by Statutory Amendment Was Itself Unconstitutional, Thereby Destroying the Only Basis of Federal Court Subject Matter Jurisdiction Ever Thought to Exist in this Case 4

ARGUMENT 3

Eleventh Amendment Immunity Is Interrelated With and Limits a Federal Court's Article III Powers, Which Are Jurisdictional and Which Cannot Be Conferred or Withdrawn by Consent of a Party 6

ARGUMENT 4

The Ninth Circuit's Decision in This Case Is in Conflict with Other Circuit Courts of Appeals 7

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Atlantic Healthcare Benefits Trust v. Googing,
2 F.3d 1 (2d Cir. 1993) 8

Butler v. New York State Department of Law,
211 F.3d 739 (2d Cir. 2000) 7, 8

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board,
527 U.S. 666, 119 S.Ct. 2219 (1999) 6

Hill v. Blind Industries and Services of Maryland,
179 F.3d 754 (9th Cir. 1999),
as amended 201 F.3d 1186 (2000) 6, 9

Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinea,
456 U.S. 694, 102 S. Ct. 2099 (1982) 9

Kimel v. Florida Board of Regents,
528 U.S. 62, 120 S.Ct. 631 (2000) . . . . . *passim*

Reese v. Michigan,
cert. denied, 2001 U.S. LEXIS 2030
(U.S. March 5, 2001) 7

Richardson v. New York State Department of Correctional Service,
180 F.3d 426 (2d Cir. 1999) 8, 9

Wisconsin Department of Corrections v. Schacht,
524 U.S. 381, 118 S.Ct. 2047 (1998) 5

Constitutional Provisions

U.S. Const., Amend. XI 1, 2, 6, 7, 9

U.S. Const., Article III 1, 2, 6, 7

INTRODUCTION

The Petition for Writ of Certiorari affirmatively demonstrated that this Court's holding in ***Kimel v. Florida Board of Regents***, 528 U.S. 62, 120 S.Ct. 631 (2000), destroyed the **only** source of federal court subject matter jurisdiction which was ever thought to exist in this case. This is because ***Kimel*** expressly declared that Congress' extension of the ADEA to the states by statutory amendment was itself improper and invalid, and therefore, unconstitutional. There was no other source of federal court jurisdiction than the ADEA in this case. The Petition also demonstrated that this Court ought to clarify the relationship between Eleventh Amendment immunity and subject matter jurisdiction as its various pronouncements on the issue, both current and historical, leave litigants and lower courts to grapple (inconsistently) with the problem of the "hybrid nature" of sovereign immunity in applying the Court's Eleventh Amendment holdings, such as ***Kimel***, to pending cases.

Respondent, the Regents of the University of California, by Brief in Opposition simply and erroneously argues that Petitioners, as private litigants, here seek to invoke the state's Eleventh Amendment immunity and that they have no right to do so. (Brief in Opp. pp. 6, 20). Petitioners simply do not assert this.

Respondent further maintains its simplistic arguments that the Eleventh Amendment operates only as an affirmative defense, a privilege to be asserted or waived at the state's sole option and pleasure. (Brief in Opp. p. 20). This position entirely ignores that there is **any relationship at all** between the Eleventh Amendment and the very jurisdiction of the federal courts which is conferred by Article III of the United States Constitution. In addition, this argument sidesteps

altogether not only the language of the Amendment itself, but also a whole body of Supreme Court precedent that discusses the limitation on a federal court's Article III powers imposed by the Eleventh Amendment.

The Brief in Opposition further fails to acknowledge that unlike the Ninth Circuit here, other Federal Circuit Courts of Appeals have in fact recognized that the Eleventh Amendment sufficiently invokes the "jurisdictional bar" so as to destroy subject matter jurisdiction, even in the absence of a state asserting its immunity. In so-doing, Respondent misses the fundamental point that if the Eleventh Amendment does indeed partake of the "jurisdictional bar", as the Supreme Court has so held, then the very existence or not of federal court subject matter jurisdiction simply cannot depend solely upon whether a state chooses, at its pleasure and at anytime, to assert or waive a limitation on a court's very judicial power. This is because subject matter jurisdiction cannot be conferred on a federal court by a party's consent.

Petitioners briefly reply to these arguments below.

ARGUMENT 1

Reply to Respondent's Statement of the Case

Respondent asserts in its Statement of the Case that Petitioners were not excluded from retirement benefits by reason of their age in that they were never eligible for such benefits because they were not members of the University of California Retirement Plan ("UCRP") and were instead members of the Public Employees Retirement System ("PERS"). (Brief in Opp. p. 1). It was in fact this lack of eligibility which constituted the *de facto* discrimination because whether an employee was eligible for the benefits was

itself dictated by age. This is because all those who were not eligible were by necessity older, having been employed by the Lawrence Berkeley and Lawrence Livermore National Laboratories prior to 1961 when the University adopted a new retirement plan for all new employees that excluded the Petitioners. Respondent also asserts that in order to have offered similar benefits to the Petitioners, Respondent would have had to create a new retirement plan at a huge cost. (Brief in Opp., p. 1-2). There simply was no evidence offered at trial to support this statement.

Respondent asserts that it was Petitioners who chose the federal forum in the first instance and who affirmatively stated on appeal that the Ninth Circuit had subject matter jurisdiction. (Brief in Opp., p. 2, 3). Of course, Petitioners did so prior to this Court's decision in ***Kimel***, and moved to dismiss immediately thereafter when, for the first time, it became clear that federal court subject matter jurisdiction was lacking.

Finally, Respondent disputes that at trial, the District Court *sua sponte* dismissed Petitioners' disparate impact claims, noting that Respondent had previously moved for summary judgment on those claims. (Brief in Opp. p. 2, ftnt 3). While Respondent did so move, that motion was denied. At the time of the District Court's actual dismissal of the claims, there was no motion pending and the Court thus acted *sua sponte*.

ARGUMENT 2

Kimel Held That Congress' Extension of the ADEA to the States by Statutory Amendment Was Itself Unconstitutional, Thereby Destroying the Only Basis of Federal Court Subject Matter Jurisdiction Ever Thought to Exist in this Case

The very language of ***Kimel***, extensively quoted in the Petition for Writ of Certiorari (Petition, pp. 10-11, 14-16), leaves no doubt that the Supreme Court was there addressing the **very constitutionality** of the 1974 Amendments to the ADEA, which for the first time extended liability thereunder against states as employers. ("This is not the first time we have considered the **constitutional validity** of the 1974 extension of the ADEA to state and local governments". ***Kimel, supra***, 517 U.S. at 72. (Emphasis added)). The Court held in ***Kimel*** that Congress **had exceeded its power** in enacting the Amendments and thus left private litigants seeking money damages against state employers to the "avenues of relief remain[ing] available" in state courts. ***Kimel, supra,*** 517 U.S. at 91. Contrary to Respondent's arguments, the Court's holding in ***Kimel*** **was not expressly made and is not by implication dependent upon whether a state has asserted its immunity**. Nor could it have been because the very basis of the holding was the conclusion that Congress had acted invalidly and unconstitutionally by enacting the 1974 Amendments at all.

Respondent's arguments that the "*ratio decidendi*" of ***Kimel*** (Brief in Opp., p. 12) only means that a state employer may now decide at its pleasure whether to assert its immunity in the face of a claim for damages under the ADEA by a private litigant, Congress not having validly abrogated

Eleventh Amendment immunity in its extension of the Act to the states, **simply does not comport with the actual language or implications of the *Kimel* holding to which the Ninth Circuit was bound in this case**. The Court's express language in ***Kimel*** certainly overrides Respondent's interpretation of its "*ratio decidendi*".

Respondent further argues that Petitioners' interpretation of ***Kimel*** would mean a complete departure from the Supreme Court's holding in ***Wisconsin Department of Corrections v. Schacht***, 524 U.S. 381, 118 S.Ct. 2047 (1998). In that case, the Court simply held that the presence of claims that were barred by the Eleventh Amendment did not destroy original removal jurisdiction over non-barred claims, removal having there furnished an independent basis for federal court subject matter jurisdiction. The instant case is readily distinguishable in that **there are no non-barred claims remaining** after ***Kimel*** which have independently conferred federal court subject matter jurisdiction, such as the removal or diversity statutes.

Thus, Respondent is simply incorrect that review must here be denied in order to comport ***Kimel*** with ***Schacht***. Moreover, Respondent has entirely ignored that the ***Schacht*** Opinion expressly states that the Court **has not yet decided whether Eleventh Amendment immunity reaches subject matter jurisdiction**. ***Schacht, supra***, 524 U.S. at 374. The very inconsistency between approaching sovereign immunity like *in personam* jurisdiction and at the same time discussing such immunity in terms of judicial power and subject matter jurisdiction which was noted in Justice Kennedy's concurring Opinion in ***Schacht*** (***Id.*** at 376) belies Respondent's assertion that that case compels the conclusion that sovereign immunity does not reach subject matter jurisdiction. In fact, the Court's noting of this inconsistency in ***Schacht*** supports the grant of

certiorari in this case in order to clarify the very issue which Petitioners here raise- i.e. the effect of sovereign immunity on subject matter jurisdiction in light of ***Kimel***.

ARGUMENT 3

Eleventh Amendment Immunity Is Interrelated With and Limits a Federal Court's Article III Powers, Which Are Jurisdictional and Which Cannot Be Conferred or Withdrawn by Consent of a Party

Respondent asserts, and the Ninth Circuit so concluded both here and in ***Hill v. Blind Industries and Services of Maryland***, 179 F.3d 754 (9th Cir. 1999), *as amended* 201 F.3d 1186 (2000)[1], that Eleventh Amendment immunity is nothing more than an affirmative defense, a personal privilege which a state may solely assert "at its pleasure". This limited

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[1]The Ninth Circuit in ***Hill*** determined that voluntary participation in the action by the state constituted a waiver of sovereign immunity. The state there had **not** expressly claimed its immunity until the first day of trial. This is a finding of constructive or implied waiver of immunity that is not permitted under ***College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board***, 527 U.S. 666, 119 S.Ct. 2219 (1999). Despite Respondent's arguments to the contrary, the ***Hill*** decision contradicts and is undermined by ***College Savings Bank*** to which the Ninth Circuit was bound as precedent. Moreover, if in the Ninth Circuit under ***Hill***, "a state may not actively participate in the lawsuit and test the winds of litigation before asserting Eleventh Amendment immunity" (Brief in Opp., p. 10), then Respondent's entire theory that sovereign immunity is a personal privilege that may be invoked or waived by the state at its pleasure falls flat.

and simplistic view ignores not only the language of the Eleventh Amendment itself, but years of Supreme Court precedent in which numerous Opinions recognize and acknowledge that the Eleventh Amendment is in fact a limitation on the judicial power of the federal courts as conferred by Article III of the Constitution and that no action of the parties can confer subject matter jurisdiction upon a federal court. (See cases cited at Petition, p. 25-26). If sovereign immunity were to be treated merely as an affirmative defense which is unrelated to subject matter jurisdiction and Article III judicial power as Respondent urges, then indeed a party would have the power to confer or withdraw subject matter jurisdiction upon a federal court "at its pleasure". This conclusion is logically inescapable if Respondent's position and the Ninth Circuit's published Opinion in this case are left to stand. Such a conclusion also promotes and allows forum shopping by states, even **after** an unfavorable result in a federal court, and is therefore anathema to judicial economy.

ARGUMENT 4

The Ninth Circuit's Decision in This Case Is in Conflict with Other Circuit Courts of Appeals

The Petition for Writ of Certiorari specifically cited cases from the Second and Sixth Circuit Courts of Appeals which have considered the Eleventh Amendment to reach subject matter jurisdiction such that the respective Courts *sua sponte* dismissed barred claims even in the absence of assertion of immunity by the defendant state (Petition, p. 21-22). See ***Butler v. New York State Department of Law***, 211 F.3d 739 (2d Cir. 2000); ***Reese v. Michigan***, *cert. denied*, 2001 U.S. LEXIS 2030 (U.S. March 5, 2001).

In spite of ***Butler*** particularly, Respondent boldly asserts that no cases from other Circuits exist or were cited which are in conflict with the Ninth Circuit in this case. (Brief in Opp. 14-18). Respondent supports this assertion by arguing that it is "unclear from the ***Butler*** Opinion whether or not the Second Circuit raised the Eleventh Amendment issue *sua sponte*" and that the "opinion does not recount the procedural history of the case in sufficient detail to determine whether or not the state had previously asserted its immunity". (Brief in Opp., p. 14-15). A simple reading of ***Butler*** itself discloses otherwise. There, the Second Circuit Court of Appeals clearly considered **on its own** and in the absence of the state asserting immunity that subject matter jurisdiction did not exist over that ADEA action against a state in the wake of ***Kimel***. ***Butler, supra***, 211 F.3d at 742-743, 745-746.

Respondent further cites to ***Richardson v. New York State Department of Correctional Service***, 180 F.3d 426 (2d Cir. 1999) as evidence that the Second Circuit is in accord with the Ninth concerning Eleventh Amendment immunity and its effect on subject matter jurisdiction. In ***Richardson***, in direct contrast to the Ninth Circuit's decision in ***Hill, supra***, the Second Circuit held that a state does not waive immunity by failing to assert it as an affirmative defense in an answer and that the defense may be raised by summary judgment after voluntary participation in the action. The ***Richardson*** Court, citing ***Atlantic Healthcare Benefits Trust v. Googing***, 2 F.3d 1 (2d Cir. 1993), expressly observed that the Second Circuit has viewed the Eleventh Amendment as affecting its subject matter jurisdiction and has raised the issue *sua sponte* to dismiss claims against a state, ***Richardson, supra***, 180 F.3d at 448.

The ***Richardson*** Court's discussion also highlights the confusion surrounding the extent to which sovereign immunity reaches subject matter jurisdiction citing varying Supreme Court decisions and concluding that immunity is **"jurisdictional enough"** that it need not be raised at all in the trial court. ***Id.*** at 448-449. This conclusion, at odds with the Ninth Circuit in ***Hill, supra***, is that which Petitioners have urged promotes inequitable forum shopping by states following an unfavorable litigation result and discourages judicial economy. This conclusion also directly conflicts with Supreme Court precedent that subject matter jurisdiction upon a federal court cannot be conferred by consent of the parties. See ***Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinea***, 456 U.S. 694, 102 S. Ct. 2099 (1982). This contradiction is unavoidable if this Court by denial of certiorari in this case lets sovereign immunity remain as "jurisdictional enough", due to its "hybrid nature", so that its quasi-status perpetuates its murky and inconsistent application.

Respondent further argues that the string of cases cited in the Petition from other Circuits in which Courts have considered subject matter jurisdiction to have been destroyed following a state's assertion of sovereign immunity are irrelevant to this case. (Brief in Opp., p. 17-18). Respondent asserts this irrelevance because here, immunity was expressly waived whereas it was asserted by the states in those cases. While the assertion of immunity or lack thereof may be a distinction, it is one without a difference in this case if, as Petitioners argue, federal court subject matter jurisdiction has already been eliminated by reason of ***Kimel*** in ADEA cases, and other Supreme Court precedent in other cases in which statutes enacted by Congress have been declared to be unconstitutional under the Eleventh Amendment. See United States Supreme Court cases cited at p. 7-8 of the Petition.

The cases cited by Petitioners from other Circuits than the Ninth nevertheless demonstrate that those Circuits apply sovereign immunity differently because they acknowledge that such immunity does indeed affect a Court's own subject matter jurisdiction in a way that the Ninth Circuit fails to do in its classification of immunity as merely an affirmative defense to be asserted by the state at its pleasure like *in personam* jurisdiction. The Ninth Circuit's approach falls short of even acknowledging that at a minimum, sovereign immunity has a "hybrid nature" and that it reaches a court's subject matter jurisdiction at all.

CONCLUSION

Wherefore, Petitioners respectfully request that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case and, ultimately, to vacate the judgment below and dismiss the matter without prejudice in order that Petitioners may repair to the state court.

Respectfully submitted,

GARY L. OLIMPIA
Counsel of Record
OLIMPIA, WHELAN & LIVELY
2502 Stevens Creek Blvd.
San Jose, CA 95128-9973
(408) 971-7252

Counsel for Petitioners